

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

UNITED STATES OF AMERICA,

vs.

Criminal No. 13-270

ATIBA WARREN,

Defendant.

Transcript of Jury Trial Proceedings on Thursday, October  
29, 2015, United States District Court, Pittsburgh,  
Pennsylvania, before Mark R. Hornak, District Judge.

APPEARANCES:

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Proceedings recorded by mechanical stenography; transcript  
produced by computer-aided transcription.

1 (Proceedings held in open court; Thursday, October 29, 2015.)

2 THE COURT: We're back in the case of the United  
3 States of America versus Atiba Warren at 13-CR-270.

4 Mr. Warren is present represented by Mr. Sindler.

5 Ms. King and Mr. Ortiz are here on behalf of the  
6 United States.

7 Ms. King and Mr. Ortiz, any matters we need to take  
8 care of before we resume our trial?

9 MS. KING: No, Your Honor.

10 MR. ORTIZ: Your Honor.

11 THE COURT: Mr. Sindler?

12 MR. SINDLER: No, Your Honor.

13 THE COURT: Mr. Sindler, is it okay to bring the  
14 jury back in?

15 MR. SINDLER: Yes.

16 THE COURT: Ms. King?

17 MS. KING: Yes.

18 THE COURT: Mr. Babik, if you'd bring the jury back  
19 down.

20 (Jury enters the courtroom.)

21 THE COURT: Good morning, ladies and gentlemen.  
22 Welcome back to Courtroom 6A.

23 Please note on the record that all twelve members of  
24 the jury and our two alternates are present.

25 All of our trial participants are present.

1 Mr. Sindler, sir.

2 MR. SINDLER: We have a witness, Judge, Travis  
3 Johnson.

4 THE COURT: Mr. Travis Johnson please step forward  
5 to be sworn.

6 TRAVIS JOHNSON, a witness having been duly sworn,  
7 testified as follows:

8 MR. BABIK: Please state your name for the record.

9 THE WITNESS: Travis Johnson.

10 THE COURT: Mr. Johnson, you may take the witness  
11 stand right there, sir. Adjust the mic so it works for you.  
12 Please keep your voice up so that we can hear you during your  
13 testimony, sir.

14 Mr. Sindler, you may examine.

15 DIRECT EXAMINATION

16 BY MR. SINDLER:

17 Q. Tell us who you are.

18 A. My name is Travis Johnson.

19 Q. Tell us about your profession.

20 A. I work for Cadnetics. We're a company who provides  
21 measuring and drafting services for architects, engineers and  
22 contractors.

23 Q. If you can, spell the name of that company?

24 A. C-A-D-N-E-T-I-C-S.

25 Q. Where is it located?

1 A. South Side of Pittsburgh.

2 Q. What does it do on the South Side of Pittsburgh?

3 A. You mean our services?

4 Q. Yes.

5 A. We provide measuring, drafting, services in regards to  
6 construction and architecture.

7 Q. For what period of time has this gone on with the company,  
8 I mean?

9 A. Approximately 20, 22 years.

10 Q. Has that been continuous?

11 A. It has.

12 Q. What has been your affiliation with the company? For what  
13 period of time, rather?

14 A. I have been with Cadnetics for approximately seven years.

15 Q. Has that been continuous?

16 A. It has.

17 Q. What is your current role at the company?

18 A. I'm vice president. It entails managing staff, making  
19 sure that the services are being done correctly, keeping up  
20 with technology.

21 Q. How large is the staff?

22 A. It varies, but roughly right about 20.

23 Q. I'm sorry?

24 A. Twenty.

25 Q. Is it that right now?

1 A. Roughly; one or two here and there.

2 Q. What period of time have you been the vice president of  
3 the company?

4 A. Maybe about five years.

5 Q. Has that been continuous?

6 A. It has.

7 Q. Before you began your work with Cadnetics, can you please  
8 describe your educational background.

9 A. I was educated through high school. Then my senior year  
10 of high school we had classes for CAD and drafting. From there  
11 I got a job with Desmone Associates. All my education has been  
12 on-the-job training.

13 Q. What does CAD stand for?

14 A. Compute-aided drafting.

15 Q. You mentioned Desmone. What is that?

16 A. Architecture firm.

17 Q. It's located where?

18 A. In the Lawrenceville side of Pittsburgh.

19 Q. For what period of time were you associated with Desmone  
20 Associates?

21 A. Roughly six years.

22 Q. Was that continuous?

23 A. It has.

24 Q. Uninterrupted?

25 A. Yes.

1 Q. You indicated before that you're a vice president of  
2 Cadnetics. Can you describe your duties at the company.

3 A. My daily duties start with usually writing proposals,  
4 preparing what services are going to be provided for the  
5 company or for the project. Then it also entails doing the  
6 work that we as a company provide. Also oversee the staff and  
7 the work that they do as well.

8 Q. The company you said is located on the South Side. Is  
9 that the company's only location?

10 A. Currently it is, yes.

11 Q. That might change you're saying?

12 A. Yes.

13 Q. Is it one floor or more than one floor, the building in  
14 that you occupy?

15 A. We occupy one floor.

16 Q. Do all the people who work for it work on that floor?

17 A. Correct.

18 Q. Describe the clientele who are served or that is served by  
19 Cadnetics?

20 A. We primarily serve architects, engineers and contractors.

21 Q. In what capacity?

22 A. Providing CAD drafting and measuring of existing  
23 buildings.

24 Q. Do you also provide drafts for new buildings?

25 A. Yes.

1 Q. Describe, please, what an architectural drawing is.

2 A. An architectural drawing is a set of documents to be used  
3 to construct a building. It's typically bound by a contract  
4 that needs to be followed, a set of instructions to construct a  
5 building.

6 Q. For that structure?

7 A. Yes.

8 Q. How does it differ from an engineering drawing?

9 A. Engineering drawings in the sense of a building are the  
10 systems within the building; the HVAC, the electrical, the  
11 plumbing.

12 Q. When you say the electrical and the plumbing, does that  
13 refer to HVAC? I'm not sure if the jury knows what that stands  
14 for?

15 A. Heating and air conditioning systems.

16 Q. Can you then distinguish, please, amongst drafting,  
17 animation and illustration.

18 A. Drafting is typically two dimensional, sometimes it can be  
19 three dimensional, but it's drawing lines, a set of  
20 instructions on how to build something.

21 Illustration is adding color or an artistic look to  
22 that.

23 Then an animation is a series of still frames or  
24 still illustrations to make up a moving picture.

25 Q. The work that you're doing for architects and engineers

1 and even contractors, what qualifications do you bring to do  
2 that kind of work?

3 A. Our company requires our staff to maintain a two-year  
4 certificate in three pieces of software, Auto-CAD, Revit and  
5 3d Max.

6 Q. What is AutoCAD?

7 A. AutoCAD is two-dimensional software to create CAD  
8 drawings.

9 Q. You had mentioned before you got to this point two  
10 dimensional and three dimensional. Can you explain a little  
11 better the difference between the two?

12 A. Two dimensional is typically, it's flat, so you only see  
13 the drawings as if you were looking at it straight on, either  
14 down or in front.

15 Three dimensional is more of what you would see in  
16 the real world where it has a flat but it has also height.

17 Q. You mentioned AutoCAD.

18 What is Revit?

19 A. Revit is a 3D drafting software so that the things that  
20 you draw are in 3D as opposed to being flat.

21 Q. Can you describe the third type you referred to?

22 A. The third type is 3d Max. That's software where you can  
23 take either the AutoCAD files or the Revit files and add color,  
24 animation and lighting to create videos.

25 Q. Can you explain BIM, please.



1 A. BIM is a process that is adopted in construction to create  
2 3D models for construction.

3 Q. What purpose does it serve?

4 A. It helps coordinate and make sure a building is being  
5 built properly.

6 Q. Because if a building is not built properly, what are some  
7 of the consequences?

8 A. Financial consequences are first. There's a lot of money  
9 involved with construction. Other than that, there's just  
10 making sure that things are correct and accurate. If things  
11 are not correct and accurate, there can also be problems with  
12 the structure and it could harm or put people in danger as  
13 well.

14 Q. What is class detection?

15 A. Class detection is the process of making sure that two  
16 objects don't occupy the same space in a building before it is  
17 built.

18 Q. So you're engaged in 3D modeling; is that right?

19 A. Correct.

20 Q. Have you already explained or can you explain further what  
21 3D modeling is, please?

22 A. 3D modeling is the process of taking either 2D information  
23 or information that is gathered in the field and recreating an  
24 object or a scene in the computer in three dimensions so it's  
25 not just a flat picture.

1 Q. Is it done manually or otherwise?

2 A. It can be done a few different ways. It could be done  
3 both.

4 Q. Do you do it manually or otherwise?

5 When I say "you," either you personally or the  
6 company for which you work.

7 A. Yes, we do it manually. We take the information and then  
8 we reconstruct that object or scene in the computer.

9 Q. Is there any automated aspect to the work that you do?

10 A. There is, but not in its entirety.

11 Q. What does that mean "not in its entirety"?

12 A. Certain parts and pieces are automated. If you wanted to  
13 create a door, you don't have to create the entire door, you  
14 pick a door object.

15 Q. Are you familiar with a 3D scanner?

16 A. I am.

17 Q. What is that?

18 A. A 3D scanner is a piece of equipment that allows you to  
19 measure a space from a given vantage point.

20 Q. Are you limited to one vantage point or can it be any  
21 vantage point?

22 A. It can be anywhere that you're able to set the scanner so  
23 you can move it around to gather multiple points.

24 Q. Does Cadnetics use a 3D scanner?

25 A. We do.

1 Q. How many do you have?

2 A. At the time of the process we had one, we now have two.

3 Q. Where are these 3D scanners obtained?

4 A. We buy them from a company called Faro.

5 Q. How is that spelled?

6 A. F-A-R-O.

7 Q. Can you describe it, please.

8 A. It's a rectangle box, approximately 1 foot by 8 inches by  
9 1 foot.

10 Q. Explain its purpose, please.

11 A. It sends out a laser measurement in a 360-degree sphere to  
12 measure points in a room or a space.

13 Q. Is something about it then rotating in one complete cycle?

14 A. Correct. The machine itself rotates 360 degrees and then  
15 the laser has a mirror that also rotates in the opposite 360.

16 Q. Is this something that in terms of accuracy is better than  
17 or different from a manual measurement?

18 A. It is better than a manual measurement.

19 Q. Why is that?

20 A. A manual measurement, if you take it using a tape measure  
21 has slack in the tape measure, so as you pull it out from one  
22 point to another, there is an amount of dip in the tape  
23 measure. The laser scanner is accurate to about a millimeter  
24 over 100 meters.

25 Q. How do you know that?

1 A. The certificates provided by the Faro Company.

2 Q. The first of the two that you referred to, this apparatus,  
3 how long is has Cadnetics been using that particular appliance?

4 A. I believe it's about three years now.

5 Q. Has that been continuous?

6 A. It has.

7 Q. During the three years it has been using that appliance,  
8 how many times has it been deployed or used on an annual basis,  
9 if you will?

10 A. We probably use it maybe 50 times, give or take.

11 Q. Are there certain people at Cadnetics who use this  
12 appliance?

13 A. Yes.

14 Q. Are you one of them?

15 A. Yes.

16 Q. How does one have the ability to use the Faro appliance?

17 A. The Faro appliance is actually a pretty simple machine to  
18 use. It has an interface very similar to a Smartphone, you  
19 just set it up in a room, pick the settings that you want to  
20 use and press the appropriate button.

21 Q. When at a place at which this appliance is used, how does  
22 one know where and how often to move it or place it within a  
23 given part of a structure?

24 A. That comes from the scope that is provided by the client.  
25 When they specify what they want to gather, the information,

1 then the operator experience comes into play of making sure  
2 that they place enough scans around the space to gather  
3 everything.

4 Q. There's a second one the company has been using and that  
5 has been for what period of time?

6 A. A couple weeks.

7 Q. The Faro appliance, is that calibrated, recalibrated,  
8 looked at, tuned up at any given time?

9 A. Yes, it's calibrated approximately every year, but not  
10 exactly every year.

11 Q. The one that you've had for more than two weeks -- the  
12 first one, rather, how often has that been calibrated, if you  
13 know?

14 A. Approximately every year.

15 Q. Why it is once a year?

16 A. That's just the recommendations of the manufacturer to  
17 make sure that all the measurements stay within the precision  
18 that they require.

19 Q. Within the business that you work, describe, please, any  
20 certifications in any specific fields or areas that you have or  
21 in which you work.

22 A. I have a certificate in BIM management. That ensures over  
23 a five-year period that we have the sufficient knowledge to  
24 create and manage BIM projects.

25 Q. Any others?

1 A. Other than the three for the software, the AutoCAD, the  
2 Revit and 3d Max.

3 Q. BIM, again, stands for Building Information Modeling,  
4 correct?

5 A. Correct.

6 Q. What is forensic mapping?

7 A. Forensic mapping is a way to use a 3D scanner to map a  
8 scene in 3D.

9 MR. SINDLER: Judge, we're at a point where we'd  
10 like to present Mr. Johnson as somebody who is qualified to  
11 provide expert testimony on computer-aided design and  
12 architectural and structuring renderings.

13 THE COURT: And to offer testimony in a form  
14 authorized by Rule 702 in the Federal Rules of Evidence?

15 MR. SINDLER: I apologize, you are right.

16 THE COURT: Ms. King and Mr. Ortiz, any voir dire on  
17 that topic?

18 MS. KING: No, Your Honor.

19 THE COURT: Any objection to the Court authorizing  
20 this witness to offer testimony in the form authorized by  
21 Federal Rule of Evidence 702?

22 MS. KING: No.

23 THE COURT: That request is granted.

24 Mr. Sindler, you may proceed.

25 The Court makes the requisite finding under that

1 rule and Mr. Johnson is authorized to offer testimony in the  
2 form of opinion within the parameters that you've described him  
3 being offered for, Mr. Sindler.

4 BY MR. SINDLER:

5 Q. Are you familiar with 520 Lincoln Avenue?

6 A. I am.

7 Q. How?

8 A. That was the property that we laser scanned and made a 3D  
9 model for.

10 Q. Do you recall when that happened?

11 A. That was December 19th, approximately 9:00 a.m.

12 Q. Which year?

13 A. 2014.

14 Q. Do you recall the circumstances by which you ended up  
15 going to that residential address?

16 A. We received a phone call from you, Mr. Sindler, to help 3D  
17 map that residence.

18 Q. Was anybody with you or who was there on that morning?

19 A. Yes, one person from Cadnetics was with me, Justin Petino.

20 Q. What was his role?

21 A. He was the operator at the time for the machine.

22 Q. What part of the house was being scanned or being mapped?

23 A. We scanned the front yard area, the front porch, the  
24 vestibule or entryway, the living room, and the dining room and  
25 the kitchen.

1 Q. Did you use the appliance to which you earlier referred?

2 A. We did.

3 Q. How many different settings or how many different places  
4 was it set while you were there?

5 A. Six.

6 Q. What part of the home was scanned?

7 A. The first floor primarily, plus exterior.

8 Q. There was no scanning done of the second floor?

9 A. There was not.

10 Q. For what period of time were you and Mr. Petino present at  
11 the site?

12 A. 45 minutes to an hour.

13 Q. Was that sufficient time to do what it was that you had to  
14 accomplish?

15 A. Yes.

16 Q. Was there any other equipment used during the course of  
17 your visit?

18 A. We used a cell phone to take a few reference photos.

19 Q. I'm sorry?

20 A. A cell phone for reference photos.

21 Q. What you just described, is that the extent of the  
22 activities that you and Mr. Petino engaged in on that day?

23 A. Yes.

24 Q. What happened after you left the premises? Not  
25 necessarily that day, but with the material that had been



1 recorded or obtained while you were at that address?

2 A. We take the scanned data back to the office. We put it  
3 together so that all the scans are in order. Because there are  
4 individual pieces, they have to be put together to be a  
5 complete, comprehensive piece.

6 After we take that scanned data, we can then 3D  
7 model that space architecturally and then we can take it into  
8 3D Max to create an illustration or an animation.

9 Q. The illustration, for starters, is that an accurate  
10 measurement of the space that was scanned?

11 A. Yes. The 3D model is an accurate to-scale model in the  
12 computer.

13 Q. At the expense of being repetitive here, how do you know  
14 that?

15 A. The laser scanner is calibrated so that the accuracy is  
16 ensured by the company.

17 Q. So for the illustration, for illustration sake, the  
18 modeling that you had done was to scale; is that correct?

19 A. Correct.

20 MR. SINDLER: I just need a moment, Judge.

21 BY MR. SINDLER:

22 Q. Mr. Johnson, I'm going to show you or ask you if the  
23 screen in front of you, can you see what is noted as Exhibit K?

24 A. I can.

25 Q. Do you recognize it?

1 A. I do.

2 Q. What do you recognize it to be?

3 A. 520 Lincoln Avenue.

4 Q. Specifically, where at 520 Lincoln Avenue?

5 A. This is the first floor of the 3D model that we produced.

6 Q. I'm going to take you here one step at a time.

7 Do you recognize the area that I'm checking off?

8 A. Correct, that is the front porch.

9 Q. That looks to be a little shaded. Why is that?

10 A. It is in the shadow of the light and the roof of the porch  
11 or the ceiling of the porch is still on, but it's slightly  
12 transparent.

13 Q. Do you recall whether that porch was covered or not?

14 A. You mean with like a roof?

15 Q. I'm sorry, a roof, yes.

16 A. Yes, it was covered.

17 Q. So it's a covered porch?

18 A. Yes.

19 Q. Do you recall the area -- I'm not sure why this is not  
20 circling.

21 THE COURT: If you need to walk over to his screen,  
22 Mr. Sindler, or Ms. King also, if that becomes necessary.

23 BY MR. SINDLER:

24 Q. I'm circling an area.

25 Do you recognize that?

1 A. Yes.

2 Q. What is that?

3 A. That is the front door of the entryway of the house.

4 Q. Then the area that I'm circling here, what is that?

5 A. The living room.

6 Q. Is that the room closest to the street or to the front  
7 porch?

8 A. Closest to the front porch, yes.

9 Q. These two circles represent what, if you recall?

10 A. Below the yellow part of the wall are two openings that go  
11 into the dining room from the living room.

12 Q. Can you place a note somehow as to what you mean by parlor  
13 wall?

14 A. Below this wall here is an opening.

15 Q. So those are both openings?

16 A. Yes.

17 Q. Now, if you remember, where on Exhibit K did you or  
18 Mr. Petino place the Faro?

19 A. We placed it in multiple locations. One was placed at the  
20 doorway here, I think one was placed here in the dining room,  
21 approximately, and one in the kitchen area.

22 Q. When looking at Exhibit K, is there a particular name or a  
23 particular way in which this is identified or characterized,  
24 this particular kind of drawing?

25 A. We would call it an isometric.

1 Q. What does isometric mean?

2 A. Isometric is just a way to visually show a 3D model,  
3 usually looking down or at an angle of an object.

4 Q. How is it possible, given that there's supposedly from  
5 other testimony in this case a second floor and, obviously, a  
6 roof to look into the structure looking at only the first  
7 floor?

8 A. The 3D program allows you to place a, like a virtual slice  
9 through the building so that you can hide the parts either  
10 above and below the slice.

11 Q. Does that affect the integrity or the authenticity of the  
12 model that is being produced?

13 A. It does not, not from a measurement standpoint.

14 Q. Why not?

15 A. Because nothing changes from a measuring standpoint, it  
16 only hides parts of the building.

17 Q. Now, in the course of this case or in the course of  
18 working with the defense, were there certain or specific  
19 measurements that were taken?

20 A. For the exhibits?

21 Q. Yes.

22 A. Yes.

23 Q. Can you describe that, please.

24 A. We provided three measurements of just a few points within  
25 the dining room from the entryway.

1 Q. I'm going to show you and bring up on the screen what is  
2 known as Exhibit L.

3 Do you see that?

4 A. I do.

5 Q. Do you recognize Exhibit L?

6 A. I do.

7 Q. What do you recognize it to be?

8 A. It's a 3D perspective with an 18-foot measurement from the  
9 entryway door to just slightly past the archway of the dining  
10 room.

11 Q. The 18 feet that is referred to on L refers to what?

12 A. You mean the point which it's measuring?

13 Q. Yes.

14 A. It's just an arbitrary point past the doorway.

15 Q. Does it take or are you using a point from the threshold  
16 of the doorway to somewhere early into the dining room area?

17 A. Yes, from the doorway into the dining room.

18 Q. I'm going to ask you to keep your eyes on the screen,  
19 please, and refer to Exhibit M.

20 Do you see that?

21 A. I do.

22 Q. What do you recognize Exhibit M to be?

23 A. Exhibit M is a similar isometric with the same point of  
24 the doorway, 22 feet farther.

25 Q. Is it about 4 feet farther from the distance shown on the

1 previous exhibit?

2 A. Yes.

3 Q. From the doorway?

4 A. From the doorway.

5 Q. I'm going to show you what is referred to as Exhibit N.

6 Do you recognize that?

7 A. Yes.

8 Q. What do you recognize it to be?

9 A. It is another 3D perspective showing 26 feet from the  
10 doorway into the dining room, 4 feet previous to the other one,  
11 8 feet previous to that.

12 Q. I'm going to circle an area in the dining room.

13 Do you recognize that?

14 A. Yes.

15 Q. What do you recognize that to be?

16 A. That is the stairs going up to the second floor.

17 Q. Was that little stairway there present when you were at  
18 the house?

19 A. Yes.

20 Q. How do you know that the distances to which you just  
21 referred on L, M, and N are accurate?

22 A. We rely on the software daily, so do many architects and  
23 engineers and other people in construction. There's a certain  
24 assumption that you trust the technology that is being  
25 provided.

1 Q. Is the same appliance that was being used in this case the  
2 one that would be used for other clients at Cadnetics?

3 A. Yes.

4 Q. Do you recall how many times before December 19, 2014, the  
5 appliance would have been used for those clients?

6 A. Many times, probably over 100.

7 Q. In preparation for this case, was there also an animation  
8 done?

9 A. There was.

10 Q. Can you explain that, please.

11 A. The animation we created was to provide a viewpoint,  
12 heading from the street up through the yard into the house and  
13 into the dining room.

14 Q. Was that done for the material that was obtained when you  
15 visited the home on December 19, 2014?

16 A. Correct.

17 Q. Just so we're clear, the only time that you or anybody  
18 from the firm had visited the home or the residence was on that  
19 date?

20 A. Correct.

21 Q. There was no time before or afterwards?

22 A. No.

23 Q. I'm going to direct your attention to the screen one more  
24 time, please.

25 Do you see it?

1 A. I do.

2 Q. Do you recognize the opening frame --

3 A. Yes.

4 Q. -- that is in front of you?

5 A. Yes, I do.

6 Q. What do you recognize it to be?

7 A. It's 520 Lincoln Avenue.

8 Q. Mr. Johnson, I'm going to run this animation and ask that  
9 you pay attention to the screen, please, until its end.

10 (Video was played.)

11 Q. Is that the sum of what was done by you for this purposes  
12 of this animation?

13 A. Yes.

14 Q. It was done by you, correct?

15 A. Correct.

16 Q. I'm going to take you back a few frames and ask you to pay  
17 attention still to the screen in front of you.

18 (Video was played.)

19 Q. Do you recognize the frame that is in front of you?

20 A. Yes.

21 Q. What do you recognize that to be, please?

22 A. The front porch at 520 Lincoln Avenue.

23 Q. Specifically, putting an X there, what is that, please?

24 A. That is the doorway into the house.

25 Q. You went through that doorway, right?



1 A. Correct.

2 Q. I'm showing you a frame that is at about the 19-second  
3 point of this 30 or so second animation.

4 Do you recognize that?

5 A. I do.

6 Q. What do you recognize that to be?

7 A. That is the view through the archway into the dining room.

8 Q. Would that be, when you looked at Exhibit L, the archway  
9 on the top of the screen or the one on the bottom of the  
10 screen?

11 A. This would be the one on the top of the screen.

12 Q. Do you recall from your measurements and the renderings  
13 that you have done in this case, the width of the passageway  
14 that is in front of you?

15 A. This one was 3 foot 6 inches.

16 Q. 3 1/2 feet?

17 A. Yes.

18 Q. How do you know that?

19 A. We measured the 3D model.

20 Q. I'm going to ask you to compare some reference points on  
21 two different exhibits, please.

22 I'm circling a portion of Exhibit K which is in  
23 front of you.

24 Is it in front of you?

25 A. It is.

1 Q. Do you see this area that I'm circling right here?

2 A. I do.

3 Q. Can you keep that in mind, please.

4 A. Yes.

5 Q. The area that I just showed you and asked you to remember  
6 from Exhibit K, do you see that on the screen in front of you,  
7 which is now showing Exhibit J?

8 A. I do.

9 Q. Can you please identify it on the screen using your  
10 finger.

11 A. That would be this wall here.

12 Q. Do you recall what it is that you just drew a rectangle  
13 around, please?

14 A. It would be a wing wall of an opening.

15 Q. When you say a "wing wall," is that part of the structure  
16 that you encountered at the house?

17 A. Yes, yes.

18 MR. SINDLER: One moment, Judge.

19 That's all we have, Judge.

20 THE COURT: Thank you, Mr. Sindler.

21 Ms. King or Mr. Ortiz, any cross-examination?

22 MS. KING: Yes, Your Honor.

23 THE COURT: You may proceed, Ms. King.

24 MS. KING: Thank you.

25 Ms. King, as I noted with Mr. Sindler, if there's

1 any reason you need to also use the witness' touch screen,  
2 you're free to do that without further ado.

3 MS. KING: Thank you, Your Honor.

4 CROSS-EXAMINATION

5 BY MS. KING:

6 Q. Mr. Johnson, you were not present at 520 Lincoln Avenue on  
7 the evening of October 23, 2012, were you?

8 A. I was not.

9 Q. You have been to the residence as you testified?

10 A. Yes.

11 Q. You went there to take a scan of the residence with your  
12 laser scanner along with Mr. Petino?

13 A. Correct.

14 Q. The purpose of taking that scan was to eventually create a  
15 3D model of the residence, including the animation we all just  
16 saw; is that right?

17 A. Correct.

18 Q. To create that model you, in fact, start by using the  
19 laser scanner?

20 A. Correct.

21 Q. The scanner essentially takes millions of measurements by  
22 shooting out a laser beam and touching all the points on  
23 whatever surface is available for it to scan; is that right?

24 A. Correct.

25 Q. Your scanner, in fact, also has a photograph or a picture

1 component to it; is that correct?

2 A. That is correct.

3 Q. Can you describe that a little bit, what your scanner does  
4 with respect to taking photographs.

5 A. When it takes the photograph, it takes the measurement,  
6 and then after the measurements, it takes the photographs and  
7 overlays the color onto the measurement.

8 Q. So, after you complete the scan, am I correct that the  
9 scanner has an SD card in it?

10 A. It does.

11 Q. If any member of the jury is not familiar with an SD card,  
12 with you explain what that is.

13 A. It's a small microchip piece that stores data.

14 Q. So you are finished with your scan, you take your scanner  
15 back to your office, you take the SD card out of the scanner  
16 and you plug it into your computer?

17 A. Correct.

18 Q. Then you download or upload or whatever all of that data  
19 that you've just scanned into your computer?

20 A. Correct.

21 Q. Once you do that, then you're able to work toward creating  
22 your final 3D rendering or model of the scene?

23 A. Correct.

24 Q. Before you get to the point of having a final version of  
25 your 3D model, there's something that is involved that is

1 called the Point Cloud; is that correct?

2 A. Correct.

3 Q. Can you describe what that is, please.

4 A. Point Cloud is a visual representation of those  
5 measurements, so it appears to look like a 3D model, but it's  
6 just a series of dots, vertices on the wall.

7 THE COURT: Ms. King, if you need the Elmo, you're  
8 also free to use that.

9 MS. KING: Thank you, Your Honor.

10 BY MS. KING:

11 Q. Mr. Johnson, I'm showing you what I have marked as  
12 Government Exhibit 10.

13 Are you familiar with that?

14 A. I am.

15 Q. What is that?

16 A. That is the Point Cloud of the front porch of the house.

17 Q. Am I correct that this Point Cloud is a necessary  
18 component of creating the final 3D animation that we just saw?

19 A. Yes.

20 Q. Did your scanner create this Point Cloud?

21 A. It did.

22 MS. KING: Your Honor, I move for admission of  
23 Government Exhibit 10 into evidence.

24 THE COURT: Mr. Sindler?

25 MR. SINDLER: I don't have any objection.

1 THE COURT: Without objection, Government Exhibit 10  
2 is admitted into the record.

3 MS. KING: May I please have permission to publish  
4 to the jury, Your Honor?

5 THE COURT: You may, Ms. King.

6 MS. KING: Mr. Babik, if I could please have my  
7 screen.

8 BY MS. KING:

9 Q. On the screen in front of you is Government Exhibit 10.  
10 Can you please describe for the jury what they're looking at.

11 A. This is a Point Cloud view of the front porch of 520  
12 Lincoln Avenue.

13 Q. I see that there's a lot of black areas around the actual  
14 residence.

15 Can you describe why that is.

16 A. When the scanner scans, we -- it gathers more information  
17 than is required. So, we removed those points for this  
18 particular image.

19 Q. Does this Point Cloud represent all of the various points  
20 that your laser scanner took, as well as the photographic  
21 overlay that you were talking about?

22 A. This one particular scanner, you're asking if it has -- if  
23 it's all of them?

24 Q. I guess where does the color come from in this Point Cloud  
25 that we're looking at?

1 A. The color comes from the laser scanner's photographs.

2 Q. I'm going to show you what I have marked as Government  
3 Exhibit 11.

4 Looking at Government 11, are you familiar with  
5 that?

6 A. I am.

7 Q. What is it?

8 A. That is the laser scanner at the point of the door at the  
9 threshold.

10 Q. This is a representation of a scan that your laser scanner  
11 took when you were at 520 Lincoln Avenue on December 19, 2014?

12 A. Correct.

13 MS. KING: Your Honor, I move for admission of  
14 Government Exhibit 11 into evidence.

15 THE COURT: Mr. Sindler?

16 MR. SINDLER: No objection.

17 THE COURT: Without objection, Government Exhibit 11  
18 is admitted into the record.

19 MS. KING: May I publish to the jury?

20 THE COURT: You may.

21 BY MS. KING:

22 Q. Government Exhibit 11, looking at it, it appears the laser  
23 scanner was, in fact, on the porch at the time this scan was  
24 taken; is that correct?

25 A. For this particular scan.

1 Q. This particular scan was able to capture a straight view  
2 from the porch, from the doorway through the living room,  
3 through the dining room and straight into the kitchen; is that  
4 correct?

5 A. Correct.

6 Q. I'm going to go and show you what has already been shown  
7 to you as Defense Exhibit J, hopefully.

8 MS. KING: Mr. Babik, could you switch to  
9 Mr. Sindler and see if it will work on his.

10 Can you put it on the 16-second mark.

11 Can you back it up just slightly, please.

12 BY MS. KING:

13 Q. Looking at Defense Exhibit J, which is a portion of the  
14 animation that you created, this is a different perspective  
15 into the house from the porch; is that correct?

16 A. Yes.

17 Q. From this different perspective, different from Government  
18 Exhibit 12 that we have just looked at, you can still see --

19 THE COURT: Were you referencing Government Exhibit  
20 12 or 11? The last one I have in is 11.

21 MS. KING: 11. Pardon me.

22 BY MS. KING:

23 Q. On Government Exhibit 11, you can still see straight from  
24 the porch through the living room, through the dining room and  
25 into the kitchen; is that correct?



1 A. That is correct.

2 MS. KING: I have no further questions, Your Honor.

3 THE COURT: Thank you, Ms. King.

4 Mr. Sindler, any redirect?

5 MR. SINDLER: No.

6 THE COURT: Do you anticipate the possibility of  
7 recalling Mr. Travis Johnson as a witness in this case,  
8 Mr. Sindler?

9 MR. SINDLER: I don't.

10 THE COURT: Can he be excused, from your  
11 perspective?

12 MR. SINDLER: Yes.

13 THE COURT: Ms. King, do you anticipate recalling  
14 Mr. Johnson as a witness?

15 MS. KING: It is possible, Your Honor. If the  
16 defense is calling any additional witnesses, we may need to  
17 have him testify.

18 THE COURT: Mr. Johnson, first, thank you for coming  
19 to federal court today, sir. We are going to ask if you could  
20 remain available to the Court in the hallway until you get word  
21 from my deputy that you have been formally released from your  
22 witness service, sir.

23 Thank you, Mr. Johnson.

24 Mr. Johnson, if those are any of the exhibits you  
25 were handed, you can set them on that little table right in

1 front of the witness box.

2 Thank you for coming to court, Mr. Johnson.

3 Mr. Sindler, sir?

4 MR. SINDLER: May I see you at sidebar?

5 THE COURT: Sure, we'll take a sidebar for the  
6 moment.

7 Ladies and gentlemen, feel free to stand up and  
8 stretch.

9 (Whereupon, there was a discussion at sidebar.)

10 THE COURT: We're at sidebar.

11 Mr. Warren is present, represented by list lawyer,  
12 Mr. Sindler.

13 Ms. King and Mr. Ortiz are here for the United  
14 States.

15 Mr. Sindler.

16 MR. SINDLER: With respect to the remainder of the  
17 defense, I'm going to need a moment to speak to Mr. Warren, and  
18 I'm looking, I know it's not an opportune time to take a break,  
19 but there's no other way to do it, I need some time.

20 THE COURT: That's fine. When you say "a moment,"  
21 approximately what do you anticipate?

22 MR. SINDLER: About five to seven minutes.

23 THE COURT: Let's assume that's ten. I'll just  
24 explain to the jury we're going to take a brief recess as we  
25 organize a few things in the courtroom.

1 MR. SINDLER: Thank you.

2 THE COURT: Anything else at sidebar?

3 MR. SINDLER: Will we be doing it in here?

4 THE COURT: You can meet with Mr. Warren wherever  
5 you make arrangements to meet with him in a private setting.

6 Ms. King and Mr. Ortiz?

7 MS. KING: No, Your Honor.

8 THE COURT: That will conclude the sidebar.

9 (Whereupon, the discussion at sidebar ended.)

10 THE COURT: The sidebar has concluded. We're back  
11 on the record in open court.

12 All trial participants and all members of the jury  
13 are present.

14 Ladies and gentlemen of the jury, although the  
15 timing is not precise, we're going to take approximately a  
16 ten-minute recess at this point. We need to organize a few  
17 things regarding the balance of the presentation for our trial.

18 So, in a moment, Mr. Babik will assist you to go up  
19 to the jury room. I do anticipate it will be in the ten-minute  
20 range.

21 Ladies and gentlemen, while you're away from the  
22 courtroom, do not seek out or receive any information about the  
23 case, the issues involved in it or any of the parties or people  
24 involved in the case. Do not discuss the case, the issues, the  
25 folks or people involved in it with anyone else, including

1 amongst yourselves. And should anybody attempt to contact you  
2 or do any of those things with you, please let Mr. Babik know  
3 that right away.

4 Mr. Babik, if you could assist the jury.

5 (Jury is dismissed from the courtroom.)

6 THE COURT: Please be seated.

7 Ms. King and Mr. Ortiz, anything we need to take  
8 care of while the jury is out of the room?

9 MS. KING: No, Your Honor. Thank you.

10 THE COURT: Mr. Sindler, same question?

11 MR. SINDLER: Just for logistics, will we be meeting  
12 in that study toward the back here?

13 THE COURT: Yes.

14 Yesterday we permitted Mr. Sindler and Mr. Warren,  
15 under appropriate guidance of your colleagues, we have a  
16 library room at the front end that they're able to use.

17 Mr. Greer, if you'd go back first and clear that  
18 room with the marshals, then you're free to use it.

19 We'll resume when Mr. Greer or Mr. Babik tells me  
20 we're ready to resume.

21 Anything else, Mr. Sindler?

22 MR. SINDLER: No.

23 THE COURT: With that, Mr. Greer, you can recess the  
24 Court.

25 (Whereupon, there was a brief recess in the proceedings.)

1 (Jury is not present in the courtroom.)

2 THE COURT: If you'd note that all trial  
3 participants are present in the courtroom, the jury is not.

4 Mr. Sindler.

5 MR. SINDLER: Judge, before we rest this morning,  
6 I'd like to move into admission or move into the record,  
7 rather, Defense Exhibits A through N, as in Nancy.

8 THE COURT: Ms. King?

9 MS. KING: I just reassert my objection to J.

10 THE COURT: Okay.

11 The Court has ruled on that and the Court will stand  
12 by its ruling.

13 The objection is noted. Defense Exhibits A, as in  
14 apple, through N, as in Nancy, inclusive are admitted into the  
15 record.

16 MS. KING: I wasn't clear that the Court had ruled  
17 that J was coming in as actual evidence. I thought that was  
18 still pending.

19 THE COURT: You are correct, Ms. King. I indicated  
20 we would take that up.

21 Mr. Sindler, are you asking that it come into the  
22 record as an exhibit?

23 MR. SINDLER: Yes.

24 THE COURT: Ms. King?

25 MS. KING: I still object. I don't think that it's

1 appropriate as an exhibit. I think it was used demonstratively  
2 and so -- it's been shown several times. I just don't think it  
3 should go back with the jury.

4 THE COURT: I'm going to overrule the objection. I  
5 will allow it to come in substantively. Arguably, the only  
6 witness whose testimony it illustrated independently was  
7 Ms. Hayes when it was shown to her on two different occasions,  
8 yesterday, and only once in the presence of the jury.

9 I find that under the applicable case law I cited  
10 yesterday, it fulfills the Third Circuit test. I think it is,  
11 particularly based on Mr. Johnson's testimony, the jury could  
12 conclude -- it will be up to the jury whether it does  
13 conclude -- but the jury could conclude that it is a fair and  
14 accurate depiction of the residence at 520 Lincoln Avenue on  
15 the date and time at issue in the case.

16 Counsel will certainly be free to argue from that  
17 and all of the other material that has come in as to the weight  
18 that the jury, if any, that the jury should give to it.

19 So I will admit Defense Exhibits A, as in apple,  
20 through N, as in Nancy, inclusive.

21 Mr. Sindler.

22 MR. SINDLER: Judge, I'm going to place these  
23 exhibits over on the table. I would just say so that we're all  
24 clear, K through N is marked on the back, just because I would  
25 be covering up something on the front of those respective

1 exhibits. And then the only way to provide an exhibit for J is  
2 a thumb drive that I have right here, which I'll put over there  
3 on the table as well.

4 THE COURT: That's fine.

5 Before any exhibits go up to the jury room, we'll  
6 make sure counsel have had collectively an opportunity to go  
7 through them to confirm that they are, in fact, the exhibits  
8 that were used in the courtroom and that it's a complete set.

9 Mr. Sindler, in terms of the thumb drive is there,  
10 so that would be the exhibit that's in the record.

11 MR. SINDLER: It is. There's no -- we changed it,  
12 given the earlier --

13 THE COURT: I'm not saying there is any funny  
14 business. The exhibit itself is the electronic content on that  
15 thumb drive.

16 MR. SINDLER: Yes.

17 THE COURT: Mr. Sindler?

18 MR. SINDLER: So at this point, the defense rests.

19 THE COURT: I'll have you say that once we have the  
20 jury back in here.

21 MR. SINDLER: Okay. I don't know if the government  
22 has any rebuttal, but we rest.

23 THE COURT: So, Ms. King, knowing that when the jury  
24 comes back, Mr. Sindler will reiterate that the defense rests,  
25 what would be the government's, if you know at this point,

1 anticipated next step?

2 MS. KING: We do not have a rebuttal case, Your  
3 Honor.

4 THE COURT: So then the testimony and evidence will  
5 have been concluded and the jury will have it.

6 Then it seems to me we need to have a charge  
7 conference.

8 MS. KING: Yes.

9 THE COURT: So we will send the jury on an early  
10 morning break. It will be probably about 10:45 when they go  
11 out?

12 MR. SINDLER: One other thing, please. Given how  
13 this day is going to evolve, due to circumstances beyond my  
14 control, a different judge in the building would like my  
15 presence in her courtroom at noon.

16 THE COURT: The Chief?

17 MR. SINDLER: The Chief, for a hearing that will  
18 take I believe a while.

19 THE COURT: When you say "a while"?

20 MR. SINDLER: I think it's going to be more than a  
21 10 or 15 minute get together. It's a six-year-old case, not  
22 that I want to go into the details, but trial is supposed to  
23 start on Monday in that case and I learned only several days  
24 ago --

25 THE COURT: This coming Monday?



1 MR. SINDLER: November 2, 2015, that the client for  
2 whom I have been standby counsel for about three continuous  
3 years just within the past week decided to have me as his  
4 lawyer or wants counsel appointed, which would appear to be me  
5 since I have been in that role for three years.

6 THE COURT: You're the likely candidate.

7 MR. SINDLER: There is going to be a colloquy,  
8 discussions about scheduling, and I think it's going to take on  
9 the order of about 30 to 40 minutes.

10 THE COURT: The Chief is meticulous.

11 MR. SINDLER: She's methodical, so that's coming up  
12 in about an hour and a half.

13 THE COURT: Let me ask you this. Let's assume that  
14 we're done with what we're going to do in the courtroom with  
15 the jury at quarter to 11, 10 to 11, something like that. Do  
16 we believe we can have the charge conference and get that  
17 squared away before you have to go see Chief Judge Conti?

18 MR. SINDLER: I'm fairly confident.

19 MS. KING: I think so, yes.

20 THE COURT: So then when we get back, when you're  
21 done with Chief Judge Conti and I'll have ruled on whatever I  
22 need to rule on relative to the charge, we'll get that all  
23 ready, then when we resume this afternoon, we would proceed to  
24 closing arguments?

25 MR. SINDLER: Okay. Sure.

1 THE COURT: Does that work for you, Ms. King?

2 MS. KING: Yes.

3 THE COURT: Am I leaving anything out that anyone  
4 can think of?

5 MS. KING: No.

6 THE COURT: So we may actually be able to charge the  
7 jury this afternoon.

8 So, Mr. Sindler, based on what you know now, it  
9 would seem to the Court that we would not plan on resuming this  
10 afternoon until 1:30, to play it safe.

11 MR. SINDLER: That's fine. Sure.

12 THE COURT: Does that make sense to you, Ms. King?

13 MS. KING: Yes, Your Honor. Thank you.

14 THE COURT: I'll just explain to the jury that's how  
15 it works without going into a lot of other detail.

16 Fortunately, it's a beautiful day outside. They can do what  
17 they want to do until approximately 1:30.

18 Mr. Sindler, anything else we ought to talk about?

19 MR. SINDLER: No.

20 THE COURT: Ms. King or Mr. Ortiz, and Mr. Ortiz?

21 MS. KING: Mr. Ortiz just reminded me that if during  
22 the course of reviewing the evidence the jury does want to view  
23 that thumb drive, we will need a clean laptop, which we can get  
24 from Mr. Fox, I believe, but we'll need to check that there's  
25 nothing else on the drive.

1 THE COURT: Funny you mention that.

2 Mr. Babik, do you have any report for counsel  
3 regarding the availability of a clean laptop, if one is needed.

4 MR. BABIK: I spoke to Shawn Fox this morning and he  
5 was going to bring one up at one o'clock this afternoon.

6 THE COURT: I will swear Mr. Fox in as an additional  
7 jury bailiff. He is an employee of the clerk's office of the  
8 court so if he has to take the laptop, he will confirm for the  
9 record that the laptop has nothing else on it and to the extent  
10 it would become necessary for him to assist the jury  
11 technologically because he would be sworn as a jury bailiff, he  
12 would be in a position to do that.

13 MR. SINDLER: In the interest of full disclosure, K  
14 through N are on that thumb drive. Perhaps he and I can work  
15 to remove them, but they're identical to what I showed here in  
16 court.

17 Now, I provided paper copies because your earlier  
18 trial management order said you wanted paper copies.

19 THE COURT: No problem.

20 MS. KING: That's fine.

21 THE COURT: That's exactly what we saw in court?

22 MR. SINDLER: It is.

23 THE COURT: No problem. We'll be good then.

24 Anything else we ought to talk about before the jury  
25 comes down?

1 MS. KING: No.

2 THE COURT: What we'll do when the jury comes back  
3 down and is seated, I'll turn to you and say something like,  
4 Mr. Sindler, then you'll report whatever you're going to do,  
5 and then, Ms. King and Mr. Ortiz, I'll turn to you and do the  
6 same thing with you.

7 If it goes as we've anticipated, I'll then explain  
8 to the jury that they can have a somewhat more leisurely lunch  
9 today.

10 Mr. Greer, anything else we need to take care of  
11 before we bring the jury down?

12 MR. GREER: Nothing else, Judge.

13 THE COURT: Can I excuse Mr. Johnson, Mr. Sindler,  
14 once we do all this?

15 MR. SINDLER: That has been my position.

16 THE COURT: I want to make sure it didn't change.

17 MS. KING: Yes.

18 THE COURT: Once we close everything down, then I'll  
19 alert you, Mr. Greer, that you can release Mr. Johnson.

20 (Jury enters the courtroom.)

21 THE COURT: Please be seated everyone.

22 Ms. Kienzle, if you would note that all twelve  
23 seated members of the jury and our two alternate jurors have  
24 returned to the courtroom.

25 All trial participants previously noted are in the

1 courtroom.

2 Mr. Sindler, sir.

3 MR. SINDLER: Judge, we move for admission of  
4 Defense Exhibits A through N, as in Nancy, please.

5 THE COURT: Inclusive?

6 MR. SINDLER: Inclusive.

7 THE COURT: Ms. King?

8 MS. KING: No objection with our prior --

9 THE COURT: All objections have been previously made  
10 and preserved.

11 All objections to Defense Exhibits A through N have  
12 been previously made, preserved and ruled on.

13 Defense Exhibits A through N inclusive are admitted  
14 into the record.

15 Mr. Sindler.

16 MR. SINDLER: The defense rests.

17 THE COURT: The defense rests.

18 Ms. King and Mr. Ortiz?

19 MS. KING: The government's case has concluded.

20 THE COURT: There will be no rebuttal case or  
21 additional presentation by the United States?

22 MS. KING: That's correct.

23 THE COURT: I did this morning direct one witness to  
24 remain around.

25 Is there any reason he cannot be excused at this

1 point, Mr. Sindler?

2 MR. SINDLER: No.

3 THE COURT: Ms. King?

4 MS. KING: No, Your Honor.

5 THE COURT: When we conclude our proceedings here,  
6 we'll tell him he's free to go about his business.

7 It would appear then, Mr. Sindler and Ms. King, that  
8 the next order of business for the Court would be, in the  
9 standard practice, to convene with counsel regarding  
10 confirmation of the final instructions that will be given to  
11 the jury later on, and then arrange a time for us to return to  
12 the courtroom for the presentation of closing arguments and the  
13 Court's final instructions to the jury.

14 Do you concur, Ms. King and Mr. Ortiz?

15 MS. KING: Yes, Your Honor.

16 THE COURT: Mr. Sindler?

17 MR. SINDLER: Yes.

18 THE COURT: Ladies and gentlemen of the jury, as you  
19 may have gathered, the scheduling of any trial in federal court  
20 moves at different rates, so where we are now is the  
21 presentation of the testimony and evidence to you has  
22 concluded. So, we're going to take a somewhat longer than  
23 normal midday break so that we can get things prepared because  
24 when we return to the courtroom to resume our trial, we'll have  
25 the closing arguments of counsel that I alerted you to when we

1 gave our preliminary instructions yesterday, along with the  
2 final instructions from the Court, and you will then be in a  
3 position to begin your deliberations.

4           So, we are not going to resume here in court until  
5 1:30 p.m. today. Fortunately, it's a nice day. It is a little  
6 bit of a longer break but that will allow the Court to have  
7 everything ready to go for when you return. So we will be on  
8 recess until 1:30 p.m. today.

9           Ladies and gentlemen, during that recess, as with  
10 all of our other recesses, you should not seek out or receive  
11 from any source, in any means, method or manner any information  
12 about the case, the participants in the case, or any of the  
13 issues that are involved. That's print, media, electronic,  
14 digital, computer, database, anything, no information from any  
15 source, no research on the part of any of you.

16           You should not discuss the case, those that are  
17 involved in it or the issues in the case with anyone, including  
18 anyone else on the jury.

19           Further, should anyone attempt to discuss any of  
20 those things with you, you need to let Mr. Babik know that as  
21 promptly as possible, if that were to arise.

22           With that, Mr. Babik, we'll excuse the jury for  
23 their midday break.

24           If you could be back in the jury room by about 25  
25 minutes after one today, that's what we would ask you to do.

1           So, Mr. Babik, if you can assist the jury.

2           (Jury is dismissed from the courtroom.)

3           (Whereupon, there was a brief recess in the proceedings.)

4           Ms. Kienzle, if you would note the jury has been  
5 excused and all the other trial participants are present.

6           Counsel, we delivered to you the other day at the  
7 end of the day in hard copy form and we've posted on the docket  
8 as Case Participant Only documents three items, a verdict form,  
9 a Court two-page document consisting of court's instructions to  
10 the jury before closing arguments, and our proposed final  
11 instructions to the jury, all of which were dated October 27,  
12 2015.

13           Why don't we take them beginning with the fewest  
14 number of pages.

15           The verdict form.

16           Ms. King and Mr. Ortiz, your position regarding the  
17 verdict form?

18           MS. KING: It's fine with us.

19           THE COURT: Mr. Sindler?

20           MR. SINDLER: This might be stating the obvious.  
21 I'm wondering because I've seen other verdict forms where the  
22 reference is made to not guilty/guilty. I'm assuming here that  
23 the foreperson would know what to write on the line since it's  
24 not given as a choice, amongst the two.

25           THE COURT: I'm happy to put the choice on. In my



1 past experience, maybe I was being inappropriately predictive  
2 in this case, there have been lengthy debates about which  
3 phrase comes first, is it left to right, top to bottom, and I  
4 thought since we had a single question on a single count, I  
5 would try a slightly different format which would require the  
6 foreperson to write in the verdict.

7 I will be saying during the final instructions, and  
8 you'll note I did make reference to the verdict form, and I  
9 would anticipate saying to the jury that whatever your  
10 unanimous verdict is, it is to be written, the word or words  
11 are to be written on that line.

12 MR. SINDLER: That's fine.

13 THE COURT: Ms. King, does that work for you?

14 MS. KING: Yes.

15 THE COURT: Does that work for you, Mr. Sindler?

16 MR. SINDLER: Yes.

17 THE COURT: The verdict form will be used in that  
18 form.

19 Then we have, and I took this verbatim from what  
20 counsel submitted, the Court's instructions prior to the  
21 closings, a two-page document.

22 Mr. Sindler?

23 MR. SINDLER: That's fine.

24 THE COURT: Ms. King?

25 MS. KING: That's fine.

1 THE COURT: Just to confirm, the way the closings  
2 go, the United States goes first, Mr. Sindler goes second, then  
3 United States gets rebuttal.

4 Is that your understanding, Ms. King?

5 MS. KING: Yes.

6 THE COURT: Mr. Sindler?

7 MR. SINDLER: Yes.

8 THE COURT: Does counsel want the instructions  
9 before or after the closings?

10 MS. KING: I think it makes sense to come before  
11 because you describe what will happen.

12 THE COURT: Mr. Sindler?

13 MR. SINDLER: I had the sense you were going to have  
14 us close first.

15 MS. KING: I thought you meant the closing  
16 instruction.

17 THE COURT: This will come, the two pages will come  
18 before you two say anything.

19 MS. KING: I like the instructions after.

20 THE COURT: After the closings?

21 MR. SINDLER: That was my understanding.

22 THE COURT: That's what we'll do.

23 On the proposed final instructions, the way I've set  
24 it up is I have numbered every paragraph. The reason I do that  
25 is so that if we're talking about a paragraph, we can talk

1 about the number of the paragraph and sometimes it accelerates  
2 things because I start by asking the party that has the burden  
3 of persuasion in the case what is the first numbered paragraph  
4 with which you have a question, suggestion or objection, the  
5 lowest number.

6 MS. KING: Paragraph 36.

7 THE COURT: Mr. Sindler, do you have any questions,  
8 objections or suggestions for a paragraph lower than 36?

9 MR. SINDLER: 12.

10 THE COURT: Let's go to 12.

11 Mr. Sindler.

12 MR. SINDLER: On the final line of Page 7, which is  
13 where 12 begins is the word "evidence," it's just a stylistic  
14 request, Judge, but when you're trying to define evidence and  
15 then you use the word evidence again. I prefer to use the word  
16 "exhibits" instead of the word "evidence" on the final line.

17 THE COURT: Ms. King, any objection if we change  
18 that to exhibits?

19 MS. KING: As Mr. Ortiz just pointed out, testimony,  
20 exhibits, and stipulations.

21 THE COURT: Mr. Sindler?

22 MR. SINDLER: That's fine.

23 THE COURT: Testimony, exhibits, and stipulations.

24 With that revision, are counsel in concurrence on  
25 Paragraphs 1 through 12 inclusive?

1 Ms. King?

2 MS. KING: Yes, Your Honor.

3 THE COURT: Mr. Sindler?

4 MR. SINDLER: Yes.

5 THE COURT: The next lowest number paragraph you  
6 have a question or concern about, anything below 36?

7 MR. SINDLER: No.

8 THE COURT: So, Ms. King, with the revisions to  
9 Paragraph 12, are all of paragraphs 1 through 35 otherwise  
10 acceptable to the government?

11 MS. KING: Yes, Your Honor.

12 THE COURT: Ms. King, you drew our attention to  
13 No. 36.

14 MS. KING: Yes, Your Honor.

15 In addition to expert testimony from Travis Johnson,  
16 we also heard testimony from William Best, so his name should  
17 be included here. That will apply to the next paragraph as  
18 well.

19 THE COURT: 37 also?

20 MS. KING: Yes. So there would have to be an  
21 additional sentence about Mr. Best's knowledge, skill,  
22 experience, training or education in the fields of --

23 MR. ORTIZ: It was toolmarks analysis, firearms  
24 operability, and serial number restoration.

25 THE COURT: So, why don't we say 36 would read: The

1 rules of evidence ordinarily do not permit witnesses to state  
2 their own opinions about important questions in a trial, but  
3 there are exceptions to these rules. In this case, you heard  
4 testimony from William Best and Travis Johnson.

5 I'm just putting them in chronological order.

6 Mr. Ortiz, those two topics were toolmarks?

7 MR. ORTIZ: There were three, toolmarks analysis,  
8 firearms operability, and serial number restoration.

9 THE COURT: So the next sentence would read:  
10 Because of his knowledge, skill, experience, training, or  
11 education in the fields of toolmarks analysis, firearms  
12 operability, and serial number restoration, Mr. Best was  
13 permitted to offer an opinion in those fields and the reasons  
14 for those opinions.

15 Because of his knowledge, skill, experience,  
16 training or education in the field of CAD drafting and 3D  
17 modeling, Mr. Johnson was permitted to offer his opinions in  
18 those fields and the reasons for those opinions.

19 MS. KING: With respect to Mr. Best, he did offer  
20 several opinions, so I think it would be for both witnesses  
21 they offered opinions.

22 THE COURT: Plural?

23 MS. KING: Yes.

24 THE COURT: The opinions will be plural.

25 Mr. Sindler, with those changes, would they be

1 acceptable to the defendant?

2 MR. SINDLER: That's fine.

3 THE COURT: Then No. 37, rather than saying the  
4 "opinion" these witnesses stated, it would be the "opinions"  
5 these witnesses stated.

6 MS. KING: Yes.

7 THE COURT: Ms. King, anything else on 36 or 37?

8 MS. KING: No, Your Honor.

9 THE COURT: Mr. Sindler, anything on 36 or 37?

10 MR. SINDLER: No.

11 THE COURT: With those revisions, are they otherwise  
12 acceptable to the defense?

13 MR. SINDLER: Yes.

14 THE COURT: Ms. King?

15 MS. KING: Yes.

16 THE COURT: The next lowest number anyone has a  
17 question or comment or objection on, Ms. King?

18 MS. KING: 39.

19 THE COURT: Mr. Sindler, anything on 38?

20 MR. SINDLER: I don't.

21 THE COURT: Ms. King, 39.

22 MS. KING: We brought this to the Court's attention  
23 prior to trial. I don't believe that the identity of  
24 Mr. Warren is at issue in this case. We had testimony from  
25 Mr. Sywyj who said he saw Mr. Warren with a gun. Mr. Warren

1 emerged from the second doorway, made a statement that the gun  
2 was a toy, and that this same Mr. Warren was interviewed by  
3 Officer Hoyson in the car and himself admitted to possessing  
4 the gun, so I do not believe that the defendant's identity is  
5 at issue in this case.

6 THE COURT: Mr. Sindler?

7 MR. SINDLER: I thought you had already ruled on  
8 that because it was brought up on Monday I think during our  
9 initial conference before we even got to the jury pool. If I'm  
10 mistaken about that, we rest upon the same arguments we made  
11 Monday morning, primarily because the man who emerged from the  
12 house having not been dispossessed of the weapon then required  
13 or led to Sywyj going into the house to get the weapon and then  
14 a decision made to arrest Mr. Warren.

15 What is certainly at issue as well as to the first  
16 point I just made is the visibility circumstances, the  
17 circumstances under which Mr. Sywyj could see Mr. Warren. So  
18 when you take into account the testimony from Ms. Hayes that  
19 the lighting was not what it would be, one, given the hour of  
20 the day, and secondly, because part of her routine in retiring  
21 for the night was to, except for a light in the kitchen, which  
22 is well away from where these circumstances evolved and  
23 developed, led to a pretty dark first floor into which  
24 Mr. Sywyj was peering.

25 MS. KING: Ms. Hayes, in fact, never testified that

1 when she went downstairs the lights were off. She testified  
2 when she went to bed they were off. She testified differently  
3 at the suppression hearing. But Officer Sywyj specifically  
4 said that the defendant is the person that he saw, that he  
5 spoke to, and Officer Hoyson said the same thing. So both  
6 individuals identified the same defendant.

7 MR. SINDLER: Mr. Sywyj didn't say that he turned on  
8 a light switch or that he activated a light, and, of course, he  
9 is going to say that he could clearly see my client, but  
10 Ms. Hayes gave a different impression.

11 THE COURT: Let me ask this.

12 Ms. King, would that be the same objection for each  
13 of the numbered paragraphs through 43 inclusive?

14 MS. KING: Yes, that entire instruction.

15 THE COURT: I'm going to give the instructions.  
16 I'll tell you why. It seems to me the gravamen of the offense  
17 that is charged is that Mr. Warren, that Mr. Warren, I don't  
18 mean to phrase it that way, Mr. Warren, but Mr. Warren seated  
19 next to Mr. Sindler was in possession of a firearm and that he  
20 was observed in the possession of the firearm.

21 You're correct, Ms. King, that Mr. Sywyj and  
22 Mr. Hoyson in the courtroom, as did Ms. Hayes, identified  
23 Mr. Warren as Mr. Warren, and that the two police officers said  
24 that Mr. Warren who is in the courtroom is who they saw that  
25 night. But it appears to the Court that it will be up to the



1 jury to decide if that is who they saw and will, with the  
2 assistance of the argument of counsel, come to whatever  
3 conclusion they're going to come to, including giving weight to  
4 Officer Sywyj and Officer Hoyson's testimony as the jury deems  
5 appropriate. So I'm going to give the instructions. The  
6 objection is noted. That's the basis for my giving the  
7 instructions.

8           Mr. Warren is not in the context of the case and the  
9 charges preferred in this case, he's not a by-stander or  
10 collateral participant, if you will, it's sort of the heart of  
11 the case, so I'm going to give those instructions. The  
12 objection is to Paragraphs 39 through 43 from the United States  
13 inclusive is noted, and as far as this Court is concerned, have  
14 been preserved.

15           Any objections or comments or questions -- what is  
16 the next lowest one you have, Mr. Sindler?

17           MR. SINDLER: 46.

18           THE COURT: Ms. King, do you have anything on 44,  
19 45?

20           MS. KING: No.

21           THE COURT: So Ms. King, are 44 and 45 agreeable to  
22 the United States?

23           MS. KING: Yes.

24           THE COURT: Are they agreeable to the defense,  
25 Mr. Sindler?

1 MR. SINDLER: Yes.

2 THE COURT: Mr. Sindler, you have a concern about  
3 46. It appears it comes out.

4 MR. SINDLER: That's all I was going to say.

5 THE COURT: Ms. King, it would appear that 46 comes  
6 out?

7 MS. KING: Yes.

8 THE COURT: 47, any objections on 47?

9 MR. SINDLER: No. Although, just so the record is  
10 clear, my client and I did discuss this. This is oftentimes a  
11 matter that can go either way when the client in a criminal  
12 case doesn't testify.

13 Here, the preference is that the instruction be  
14 given about his not testifying, the fact that it should not be  
15 held against him.

16 THE COURT: Ms. King, any objection to giving the  
17 instruction at 47?

18 MS. KING: No.

19 THE COURT: It will be given.

20 Ms. King, what is the next lowest one that you have  
21 a question or objection on?

22 MS. KING: 54.

23 THE COURT: Mr. Sindler, anything before 54?

24 MR. SINDLER: No.

25 THE COURT: So 47 through 53 inclusive are agreeable

1 to the government, Ms. King?

2 MS. KING: Yes.

3 THE COURT: Mr. Sindler?

4 MR. SINDLER: Yes.

5 THE COURT: Ms. King, 54.

6 MS. KING: Your Honor, it seems the essence of this  
7 instruction is that the government and the defendant are equal  
8 before the law, which is true, but on the second page, on 32,  
9 where it says: No greater weight should be given to the  
10 testimony of a witness connected with the government than to a  
11 witness who is not, we would prefer that the instruction read  
12 something to the effect of: No greater weight should be given  
13 to the testimony of any witness connected with either party,  
14 instead of saying that specifically the government's witnesses  
15 should not receive greater weight.

16 THE COURT: Mr. Sindler, any objection to that  
17 revision?

18 MR. SINDLER: Well, I do have an objection because  
19 we already, when we picked a jury have Question 8 that was part  
20 and center at certain times on Monday and Tuesday of this week  
21 with respect to getting the jury that we did, that is that  
22 there's a tendency for people to give greater weight because of  
23 a uniform, a badge, or working in a law enforcement capacity to  
24 somebody who comes into court with that kind of background.  
25 The instruction seems to be perfectly appropriate.

1           THE COURT: Well, that's a possibility. I'm not a  
2 psychologist and I didn't train as a psychologist for this job,  
3 but I would also note, although it was not a question requested  
4 by any party in voir dire, the Court prior to having this job  
5 did get around a little bit, it's also possible that there are  
6 people on the jury who, for their reasons, on any jury, for  
7 their reasons, they find logical to have concerns about the  
8 government and, therefore, they may give greater weight to  
9 people that testify or present things contrary to the  
10 government.

11           So, I'm going to revise 54 to read as follows: The  
12 government and the defendant, Atiba Warren, are equal before  
13 the law. No greater or lesser weight should be given to the  
14 testimony of a witness connected with either party.

15           Is that agreeable with you, Ms. King?

16           MS. KING: Yes. Thank you.

17           THE COURT: Mr. Sindler, do you still have an  
18 objection?

19           MR. SINDLER: I do. It's only because I don't know  
20 that anybody testified contrary to what the government or what  
21 government witnesses had said in this case. So I'm just noting  
22 the objection.

23           THE COURT: It is noted, Mr. Sindler.

24           Mr. Sindler, what is the next lowest number you have  
25 an objection, question or concern with?

1 MR. SINDLER: 69.

2 THE COURT: Ms. King, anything below 69?

3 MS. KING: 60.

4 THE COURT: Are 55 through 59 agreeable to the  
5 government, Ms. King?

6 MS. KING: Yes, Your Honor.

7 THE COURT: Mr. Sindler?

8 MR. SINDLER: Yes.

9 THE COURT: 60, Ms. King.

10 MS. KING: Your Honor, it seems to the government  
11 that this is a 404(b) type instruction and there was no 404(b)  
12 evidence elicited in this case.

13 There are two other occasions within these jury  
14 instructions where the Court essentially says the same thing,  
15 and so simply because there was no 404(b) evidence elicited, I  
16 don't think that this is necessary.

17 THE COURT: Mr. Sindler?

18 MR. SINDLER: The problem is that in a case like  
19 this, we can't bifurcate out prior conviction and felon in  
20 possession prosecution --

21 THE COURT: Because it's an element.

22 MR. SINDLER: -- the tendency is that there is going  
23 to be undue influence or weight paid by a juror or the jury to  
24 the prior conviction that was, particularly in this case wasn't  
25 contested but instead stipulated to. The instruction seems

1 perfectly appropriate under these circumstances.

2 MS. KING: Your Honor, it is our position that that  
3 is, in fact, when the Court goes over the prior stipulation  
4 about the conviction and immediately thereafter the Court says  
5 the same type of thing right at that point.

6 THE COURT: I'll take a look at that, but it's  
7 likely I'll leave 60 in because this is one of the rare cases  
8 where everyone knows you have to tell the jury about a prior  
9 conviction without ever getting to 609 or 404. So the jury  
10 affirmatively knows that Mr. Warren has been convicted of an  
11 offense in state court for which the punishment was a term in  
12 prison in excess of a year -- which the punishment could be a  
13 term in prison in excess of a year.

14 So I'll look it over. If I find it to be unduly  
15 cumulative or repetitive and would modify it, I would alert  
16 counsel to that, but as of now I would leave it in, Ms. King.

17 MS. KING: Thank you.

18 THE COURT: Next lowest number you have, Ms. King?

19 MS. KING: Your Honor, I am sorry, I missed one at  
20 Paragraph 17.

21 THE COURT: That's fine.

22 Let's all go back to 17.

23 MS. KING: Page 11.

24 The sentence that reads: You should not show  
25 prejudice -- you should not show prejudice against an attorney

1 or his -- I think it should be his or her client.

2 THE COURT: Okay.

3 MS. KING: Or their client.

4 THE COURT: Why don't we say: You should not hold  
5 it against an attorney or their client because the attorney has  
6 made objections.

7 So it would read: You should not hold it against an  
8 attorney or their client because the attorney has made  
9 objections.

10 MS. KING: Yes.

11 THE COURT: Does that resolve it, Ms. King?

12 MS. KING: Yes.

13 THE COURT: Is that agreeable with you, Mr. Sindler?

14 MR. SINDLER: That's fine.

15 THE COURT: The last one we talked about was 60.

16 Ms. King, what was your next lowest one with  
17 questions, comments or objections?

18 MS. KING: Paragraph 79.

19 THE COURT: Mr. Sindler, do you have anything  
20 between 60 and 79?

21 MR. SINDLER: I'm sorry, I thought I said 69.

22 THE COURT: So are Paragraphs 61 through 68  
23 inclusive agreeable with you, Mr. Sindler?

24 MR. SINDLER: They are.

25 THE COURT: Ms. King?

1 MS. KING: Yes.

2 THE COURT: We're at 69, Mr. Sindler.

3 MR. SINDLER: Judge, we reached two stipulations in  
4 this case and this is a point at which unlike any other  
5 evidence in a case when it comes to jury instructions where  
6 evidence being reviewed as part of the jury instruction, and  
7 it's particularly evidence that goes to the element of the  
8 offense, it appears -- not appears, it seems to me that it  
9 gives more weight than it should to this particular stipulation  
10 by reviewing that evidence as part of the jury instruction.

11 THE COURT: If we go ahead to Paragraph 81, aren't  
12 we doing the same thing relative to the stipulation that it  
13 traveled in interstate, and maybe Ms. King is going to tell me  
14 it should be interstate or foreign commerce, and that the  
15 reason we have Paragraph 70 and 71 and 72, we have follow-up  
16 paragraphs to the stipulation paragraph of 69, are to look out  
17 appropriately for the interests of Mr. Warren or anyone in  
18 Mr. Warren's shoes. But isn't 69 and 81, aren't they parallel?

19 MR. SINDLER: They are. I was actually going to  
20 object to that as well this morning. But you can still say,  
21 and I don't have it spelled out on some piece of paper here  
22 that there has been evidence in this case that the parties have  
23 stipulated to, and then get into the paragraphs that you're  
24 referring to as to how or what weight, if any, should be given  
25 to those stipulations, without explaining or describing that



1 which has been stipulated to.

2 THE COURT: So, if 69 began with: Evidence has been  
3 submitted that Atiba Warren was convicted of a crime in state  
4 court and that this conviction occurred prior to the time  
5 Mr. Warren or Atiba Warren is alleged to have possessed the  
6 firearm in question.

7 So your objections to 69 through 72 are to the  
8 extent it references a stipulation as opposed to evidence?

9 MR. SINDLER: Instructions as to how the jury should  
10 look at a stipulation is one thing, but we're explaining or  
11 describing once again the evidence itself as part of these jury  
12 instructions and that is to what I'm objecting.

13 THE COURT: Let's hear from Ms. King.

14 MS. KING: Your Honor, the model instructions  
15 themselves, this is based on the model instructions from the  
16 Third Circuit, and so we think it is absolutely appropriate.

17 I mean I would note that these -- the draft  
18 instructions that we submitted to the Court were submitted as  
19 we were working out what the actual stipulations would be, and  
20 so as I'm looking at 69, I don't know that it necessarily  
21 exactly tracks the stipulation that we actually entered into,  
22 but when I look -- when I look in the model instructions, this  
23 is exactly what the model instructions say what this  
24 instruction is. So I think it should be given. I think it  
25 should be given as it's given in the model instructions.

1           The other thing I would point out is if the  
2 defendant didn't want the stipulation to come in as it did,  
3 what the instruction would actually -- according to the model  
4 instructions, the Court would tell the jury that the government  
5 has alleged and introduced evidence that the defendant was  
6 convicted of, and you name the crime, which would be in this  
7 case robbery with a deadly weapon. So you would be saying that  
8 to the Court, had we not had the stipulation in, so I think  
9 it's kind of an end runaround of the stipulation we entered  
10 into to ask for this.

11           MR. SINDLER: If that would have happened, I would  
12 have objected to that as well, but we're not dealing with that  
13 now, we're dealing with what we have here in this case.

14           THE COURT: I'm going to take a look at it,  
15 Mr. Sindler. Your objection is noted. It's likely that I'm  
16 going to leave at least as to Paragraph 69 and the following  
17 paragraphs through 72 inclusive, that I'm going to leave them  
18 in because I do believe, although it was not directly addressed  
19 because it was not before our Court of Appeals in Caldwell, I'm  
20 coachable as a district judge, and one of the messages I  
21 believe that came through loud and clear in Caldwell is that  
22 district judges have an obligation to make sure the  
23 instructions are clear when there is evidence admitted into the  
24 record in a criminal trial of a defendant's prior convictions  
25 or prior conviction that I give an appropriate limiting

1 instruction or instructions as to what use that is not to be  
2 made of.

3 I believe because that evidence has come in, I'm  
4 going to give the instructions in 70 through 73 because I think  
5 it's important to do that, and I think they only make sense in  
6 the context of something like 69.

7 So I will take a look at the verbiage while we're on  
8 break in the context that you've noted. When we come back out,  
9 what I anticipate we'll do, Mr. Greer, you need to remind me of  
10 this, is we'll have this document, any revisions done in two  
11 forms, red line and clean. Clean will, of course, be the one  
12 I'll read from once it has been resolved and what would go to  
13 the jury room, but I'll make any other revisions in red line so  
14 that they can be quickly observed by counsel and then we can do  
15 what we need to do on the record.

16 So, the objection is noted. It's likely I'm going  
17 to leave them in either as is or substantially as is.

18 So, other than the sort of principle objection or  
19 objection based on that broad principle that you've noted,  
20 Mr. Sindler to 69, does that also carry over to 70, 71 and 72,  
21 sir?

22 MR. SINDLER: It does.

23 THE COURT: It's noted.

24 Any other objections to 69 through 72 inclusive,  
25 Mr. Sindler?

1 MR. SINDLER: Through what, I'm sorry?

2 THE COURT: 69 through 72 inclusive?

3 MR. SINDLER: No.

4 THE COURT: Ms. King?

5 MS. KING: No.

6 THE COURT: Any objections to 73?

7 Or what is the next lowest one anyone has an  
8 objection on of 73 or higher.

9 Ms. King?

10 MS. KING: 79.

11 THE COURT: Mr. Sindler, anything before 79?

12 MR. SINDLER: 76.

13 THE COURT: Does that mean that 73 through 75 will  
14 are acceptable to you, Mr. Sindler?

15 MR. SINDLER: They are.

16 THE COURT: To you, Ms. King?

17 MS. KING: Yes.

18 MR. SINDLER: It's stylistic, the word  
19 "insufficient," I prefer it to read "not sufficient."

20 THE COURT: Ms. King, is that okay?

21 MS. KING: Yes.

22 THE COURT: So it becomes two words "not  
23 sufficient."

24 That changes is made.

25 Next lowest number you have a question or an

1 objection to or question?

2 MS. KING: 79.

3 THE COURT: Anything with 77 or 78, Mr. Sindler?

4 MR. SINDLER: No.

5 THE COURT: Those are agreed to.

6 79, Ms. King?

7 MS. KING: As Your Honor indicated, we would like to  
8 add: In foreign and/or in interstate commerce.

9 THE COURT: That would be at the very last line:  
10 The firearm has traveled in foreign or interstate commerce.

11 MS. KING: Yes.

12 THE COURT: Mr. Sindler?

13 MR. SINDLER: Okay.

14 THE COURT: That change is made.

15 Mr. Sindler, what is the next lowest one you have a  
16 question, concern or objection to?

17 MR. SINDLER: We just raised it, it's 81, but it  
18 sounds like it's pending or being addressed.

19 THE COURT: Okay. It is.

20 Ms. King, anything with 80 or 81?

21 MS. KING: Same thing in the last line: Foreign or  
22 interstate commerce.

23 THE COURT: In 81?

24 MS. KING: Yes.

25 THE COURT: Mr. Sindler, next lowest number after

1 81?

2 MR. SINDLER: 101.

3 THE COURT: Ms. King, anything before 101?

4 MS. KING: No.

5 THE COURT: 82 through 100 are agreeable to the  
6 government; is that correct?

7 MS. KING: Yes.

8 THE COURT: 82 through 100 are agreeable to the  
9 defense, Mr. Sindler?

10 MR. SINDLER: Yes.

11 THE COURT: 101, Mr. Sindler.

12 MR. SINDLER: There is a reference to plural  
13 charges, Judge, on the fourth line. It should read as to "the  
14 one charge" as opposed to "any charges."

15 THE COURT: So, if we changed "any charges" to "the  
16 charge against Mr. Warren," that would be accurate?

17 MR. SINDLER: Well, I was suggesting: You cannot  
18 return a verdict as to the one charge, I'm not sure that there  
19 has to be a reference to Mr. Warren.

20 THE COURT: How about: The one charge in this case?

21 MR. SINDLER: That's fine.

22 THE COURT: Ms. King, is that agreeable with you?

23 MS. KING: Yes.

24 THE COURT: That change will be made.

25 Next lowest number you have, Ms. King?

1 MS. KING: We have no further comments.

2 THE COURT: Mr. Sindler?

3 MR. SINDLER: Nor do we.

4 THE COURT: We'll get these made. We'll give  
5 counsel copies in red line. What we may do, Mr. Sindler, is if  
6 they're made before you -- would it be possible for everyone to  
7 hang around here until I give these to you because I think I  
8 may give them to you by quarter to twelve or ten minutes to  
9 twelve.

10 Is that agreeable?

11 MR. SINDLER: If you will, I'm going to be camped  
12 out in a Judge Conti conference room, it's only one floor down  
13 directly below us, is that okay?

14 THE COURT: That's fine.

15 Ms. King, can you or Mr. Ortiz, or we can get them  
16 down to you on the fourth floor.

17 MR. ORTIZ: I can wait for it.

18 THE COURT: We'll get these taken care of. We'll  
19 give you clean and red line. All the paragraph numbers I've  
20 referenced to, Ms. Kienzle, are the paragraph numbers in the  
21 documents that were delivered to counsel in October 27 and  
22 posted as Case Participants Only Documents on those dates.  
23 They will change because we're deleting one paragraph in its  
24 entirety, so the number of the paragraphs coming after that  
25 will be different on the forms that we give you now. So, all

1 of the references during the charge conference, Ms. Kienzle,  
2 were to the numbers on that prior ECF document. We'll get this  
3 taken care of.

4 Mr. Ortiz, thank you for hanging around.

5 Mr. Sindler, we'll get a set of copies down to you.

6 Then when we resume before we have the jury, we'll  
7 do a final run through, all the objections you've made, as far  
8 as I'm concerned, are deemed preserved and we'll go from there.

9 Ms. King and Mr. Ortiz, anything else we should take  
10 up right now?

11 MS. KING: No, Your Honor. Thank you.

12 THE COURT: Mr. Sindler, anything else?

13 MR. SINDLER: No.

14 THE COURT: Mr. Greer, if you'd recess the Court.

15 (Whereupon, there was a brief recess in the proceedings.)

16 THE COURT: First, Ms. King and Mr. Ortiz, did you  
17 get copies of the red line jury questions?

18 MS. KING: Yes.

19 THE COURT: Mr. Sindler, did you get a copy of the  
20 red line jury instructions?

21 MR. SINDLER: Yes.

22 THE COURT: I believe Mr. Ortiz gave them to you.

23 MR. SINDLER: Yes.

24 THE COURT: I have two other suggested  
25 modifications. If I could draw counsel's attention to



1 Paragraph 13, it had made a reference to at subparagraph D to  
2 judicially noticed facts. There have been none in this case,  
3 so my thought was to delete D to avoid any risk of confusion.

4 Ms. King, what do you think about that?

5 MS. KING: We agree with that.

6 THE COURT: Mr. Sindler?

7 MR. SINDLER: Sure.

8 THE COURT: Then at Paragraph 71, the very last line  
9 of that reads: Doubt all of the elements of this crime.

10 My thought would be to change it to: Doubt all of  
11 the elements of the crime charged in this case.

12 Avoids confusion that someone would think I'm saying  
13 there was a crime as opposed to the crime charged in this case.

14 Mr. Sindler?

15 MR. SINDLER: I was turning to that part of the  
16 instructions.

17 THE COURT: Rather than saying, "this crime," it  
18 would read, "the crime charged in this case."

19 MR. SINDLER: That's fine.

20 THE COURT: Ms. King?

21 MS. KING: That's fine.

22 THE COURT: So, we'll make those two changes.

23 Ms. King and Mr. Ortiz, let me state this both as to  
24 the government and the defense, all objections previously made,  
25 unless they have been sustained by being adopted in the charge

1 are deemed by this Court to have been made and preserved.

2           Subject to any prior objections or requests,  
3 Ms. King, any objections to the charge with the two  
4 modifications I have just made, or Mr. Ortiz?

5           MR. ORTIZ: No objections to the change you just  
6 made, but I do have two additional issues I want to bring up.

7           The first is pretty straightforward in Paragraph 79.  
8 I think we missed the "or foreign" in relation to the commerce.  
9 It's the last sentence of Paragraph 79.

10           THE COURT: That would read: Had traveled in  
11 foreign or interstate commerce.

12           MR. ORTIZ: I think that would be consistent with  
13 the other paragraphs we mentioned and the stipulation.

14           THE COURT: Mr. Sindler, any objection to making  
15 that modification to Paragraph 79?

16           MR. SINDLER: No.

17           THE COURT: Without objection, it will be made.

18           MR. ORTIZ: Then the other is in 70, on Page 38. I  
19 know that you said you were going to review the language, take  
20 it under consideration potentially modify the language and it  
21 looks like the modification was to because it relates to one of  
22 the elements of the crime.

23           THE COURT: Okay.

24           MR. ORTIZ: My suggestion would be that to the  
25 extent it needs to be modified from the pattern jury

1 instruction, that it be modified to something to the effect of  
2 the jury may find that it tends to establish, which would be  
3 more consistent with the pattern as well as more consistent  
4 with the purpose through which we -- which we had for  
5 submitting the stipulation, it doesn't just relate to that  
6 element. That was our evidence for that.

7 THE COURT: So let me just take a moment.

8 I appreciate it, Mr. Ortiz, let me take a minute to  
9 look at it.

10 What if it read: Was brought to your attention only  
11 in regard to.

12 MR. ORTIZ: Well, Your Honor, it wasn't brought in  
13 regard to it, it was brought because it is our evidence of  
14 that. So I don't believe that "in regard to" or "relates to"  
15 is appropriately reflecting the purpose that we entered into  
16 that stipulation. If it wasn't going to be used to establish  
17 that, we wouldn't have stipulated to it. We would have  
18 actually proved it by putting in the certified conviction. So,  
19 to the extent that it is going to vary from what is the  
20 accepted model instruction, I think it really only should be:  
21 You may find that it tends to, or something to that effect  
22 because it is a stronger use than just regards or relates.

23 THE COURT: What if it was: Was brought to your  
24 attention by the government in order to demonstrate one of the  
25 elements of the crime or in order to prove -- in an effort to

1 prove, was brought to your attention by the government --

2 MR. ORTIZ: Respectfully, Your Honor, it's a joint  
3 stipulation. He agreed to it. So it isn't just -- it isn't  
4 just the government's proposition that it establishes this or  
5 that it relates to it. It was agreed upon that this occurred,  
6 that this fact is submitted to the jury and should be  
7 considered for --

8 THE COURT: Doesn't Paragraph 68 give you all of  
9 that with a lot of horsepower, Mr. Ortiz?

10 MR. ORTIZ: But Paragraph 70 then walks it back.  
11 That's why the model instruction has the language that it does.  
12 The modification removes the true purpose of the stipulation  
13 and why we entered into it.

14 THE COURT: What if we take out everything in  
15 Paragraph 70 so that it begins with: You are not to speculate  
16 as to the nature of the conviction. You may only consider  
17 it -- so that it essentially addresses the Caldwell type issues  
18 and we just take off the stuff at the beginning because that's  
19 covered by 68?

20 MR. ORTIZ: If I understand you, you're proposing to  
21 remove the full first two sentences?

22 THE COURT: What if we took that out and began  
23 Paragraph 70 with: You are not to speculate.

24 The only reason the first two sentences are in are  
25 really to focus on the word "only" because 68 says the parties

1 have stipulated to this and that it occurred, et cetera, et  
2 cetera. The beginning of 70 is an effort to focus the jury's  
3 attention that they're to give it one use and one use only.

4 MR. ORTIZ: Right, but those preceding paragraphs  
5 don't say what the stipulation is relevant for.

6 THE COURT: Yes, but one of you is going to give a  
7 closing that is going to explain that, right?

8 MR. ORTIZ: But this is part of their instruction,  
9 they have to consider it, to the extent they have a  
10 consideration or a question about what Ms. King read into the  
11 record as far as the stipulation is concerned, this is their  
12 guidance for that.

13 THE COURT: Take a minute and read 67 and 68  
14 together to ourselves.

15 MR. ORTIZ: Your Honor, my read of 67 and 68 is,  
16 again, stating there is a stipulation, but it isn't explaining  
17 the purpose for it, as it relates to the elements that you set  
18 out. This is what the purpose of the beginning Paragraph 70  
19 is.

20 THE COURT: I think you're asking for a double dip.  
21 The only reason for -- the only reason Paragraph 70 is in here  
22 is in open court, everyone has said out loud, properly, without  
23 the strictures of 404 or 609 that Mr. Warren is for purposes of  
24 this statute a convicted felon. Normally, we don't talk about  
25 that in a criminal trial unless it comes within 404, 609. So

1 there's caution about that. So, that's the only reason 70 and  
2 71 are in here is to give caution as to what use can and can't  
3 be made of that information. The fact that it's an element of  
4 the crime is Paragraph 67 and the fact that the parties have  
5 stipulated to those facts is 68, and then we talk -- and 69  
6 says, you can treat that stipulation as a proven fact, but  
7 you're not required to do so.

8           So, it seems to me that Mr. Sindler or anybody in  
9 Mr. Sindler's shoes could say, Judge, I understand why you have  
10 70 and 71 in at all, I've talked to Mr. Warren about it and we  
11 don't want you to do 70 or 71. Those two paragraphs are for  
12 the benefit of the defendant, not for the benefit of the United  
13 States.

14           MR. ORTIZ: Your Honor, the instruction isn't for  
15 us, it's for them and --

16           THE COURT: I understand. It seems to me 70 and 71  
17 when I say they're for the benefit of the defendant, they're to  
18 protect the interest of the defendant in assuring that evidence  
19 of another crime is not used for a propensity-based purpose,  
20 which is beyond 404. Generally in our law, we do not allow  
21 propensity evidence of any type to come in. I'm to guard  
22 against it. That's why 70 and 71 are in. It seems to me,  
23 Mr. Ortiz, 67, 68 and 69 say for there to be guilt of  
24 Mr. Warren, you have to find that the government proved he had  
25 been convicted of a crime punishable by a term of imprisonment

1 of more than a year. That's 67. 68 says the parties have  
2 agreed he was so convicted. And that it occurred at the right  
3 time. And 69 says, if you want, you can treat that as proven,  
4 but you don't have to because you're the judge of the facts.

5 At that point, I think the instructions have  
6 addressed that there was a stipulation, what the stipulation  
7 was, and what the jury may but is not required to do with it.

8 The only reason 70 is in here, and I focus on the  
9 word only in the fourth line, is as a cautionary instruction to  
10 the jury that you can consider that fact only because that  
11 criminal record is an element of the offense. Otherwise, 70  
12 and 71 wouldn't be in the instructions.

13 MR. ORTIZ: Well, Your Honor, I don't want to repeat  
14 myself too much, but I respectfully disagree. I believe to the  
15 extent the Court is inclined to change the pattern jury  
16 instruction on this issue, I don't believe that this is a  
17 proper way to change it. If you were inclined to make a  
18 change, it should be limited to something to the effect of:  
19 You may find that it tends to establish.

20 THE COURT: I think that's already in 69. I go  
21 beyond that, I say: You may treat it as a proven fact.

22 I think I've covered you in 69, Mr. Ortiz.

23 Mr. Sindler, do you want instructions 70 and 71?

24 MR. SINDLER: I do.

25 THE COURT: Do you want them because you believe

1 they're necessary as non-propensity directives to the jury?

2 MR. SINDLER: I do.

3 THE COURT: I'm willing to change, Mr. Ortiz,  
4 "brought to your attention only because it relates to one of  
5 the elements of the crime," to "brought to your attention only  
6 in conjunction with one of the elements of the crime," or "only  
7 in regard to one of the elements of the crime." Or I'll leave  
8 it just as it is.

9 MR. ORTIZ: Given the choices, I believe that "in  
10 conjunction" would be the term that would be most consistent  
11 with the pattern jury instructions.

12 THE COURT: Mr. Sindler, do you have an objection if  
13 I change it to "your attention only in conjunction with one of  
14 the elements of the crime"?

15 MR. SINDLER: That's fine.

16 THE COURT: Mr. Ortiz or Ms. King?

17 MR. ORTIZ: That's all.

18 THE COURT: Mr. Sindler, recognizing the other  
19 objections previously in our charge conference that were made,  
20 in this Court's estimation are preserved, any other amendments,  
21 corrects, objections other than those that have been noted?

22 MR. SINDLER: No.

23 THE COURT: What we'll do is I'll have Mrs. Dressler  
24 make the revisions. It's my intention we'll deliver -- once  
25 the jury is excused after I give the instructions, we'll then



1 make the copies that go up to the room. We're not going to  
2 make them yet because you may once they're out of the room, I  
3 will ask each side if you have any objections or corrections to  
4 the charge as delivered to the jury outside of the presence of  
5 the jury. Then if any would have to be made, then we would  
6 make them.

7           So at this point, we'll make copies for counsel and  
8 Mr. Warren to have and the Court to have during its reading of  
9 them. We'll make the circulation copies that will go to the  
10 jury room once they have been discharged. We have arranged for  
11 Mr. Fox to be back up here, we'll call him around three  
12 o'clock. We'll swear him in as a jury bailiff. He has a clean  
13 computer. He will go with Mr. Babik up to the jury room and  
14 show someone how to set it up if they need to have that done.

15           Mr. Greer, could you save time and ask Mrs. Dressler  
16 to come out and see me.

17           MR. GREER: Yes.

18           THE COURT: Ms. King and Mr. Ortiz, are there any  
19 other matters we ought to take up once we get these logistics  
20 back and proceed to closing arguments?

21           MS. KING: No, Your Honor.

22           THE COURT: Mr. Sindler?

23           MR. SINDLER: No.

24           THE COURT: Ms. King, just for information purposes,  
25 who is going to deliver the closing argument for the United

1 States?

2 MS. KING: I will, Your Honor.

3 THE COURT: Mr. Sindler, if you need anything moved  
4 before your closing argument, if you're going to be over there  
5 and need the podium moved, just feel free to move it.

6 MR. SINDLER: I can do that. I'm going to have to  
7 make sure this is working, too, because we've had plenty of  
8 instances the last couple of days that due to circumstances  
9 beyond my control --

10 THE COURT: Do you want to check her out right now?

11 MR. SINDLER: Sure.

12 It's working now.

13 THE COURT: You can check it again later,  
14 Mr. Sindler. No problem, better safe than sorry.

15 Ms. King and Mr. Ortiz, any reason we can't bring  
16 the jury down?

17 MS. KING: No, Your Honor.

18 THE COURT: Mr. Sindler, may we bring the jury down?

19 MR. SINDLER: Yes.

20 THE COURT: Mr. Babik, bring the jury down.

21 (Jury enters the courtroom.)

22 THE COURT: Please be seated.

23 Ms. Kienzle, if you would note that all twelve  
24 members of the jury and our two alternate jurors are returned  
25 to the courtroom.

1 All trial participants as previously noted are  
2 present in the courtroom.

3 Thank you, ladies and gentlemen of the jury.

4 Members of the jury, you have heard and seen all of  
5 the evidence in this case. The lawyers now have the  
6 opportunity to present their closing arguments. Under the  
7 rules of procedure, the government will argue first, and then  
8 the defense will present its closing argument, and finally the  
9 government may, if it chooses, argue in response or in rebuttal  
10 to the defense's argument.

11 Closing arguments are designed to present to you the  
12 parties' theories about what the evidence has shown and what  
13 conclusions may be drawn from the evidence. Remember, what is  
14 said in closing arguments is not evidence. You have already  
15 heard and seen all of the evidence in this case.

16 After the lawyers present their closing arguments, I  
17 will give you my final instructions concerning the law that you  
18 must apply to the evidence in reaching your verdict. Although  
19 the lawyers may mention points of law in their closing  
20 arguments, the law that you must follow in reaching your  
21 verdict is the law that I will give you in my final  
22 instructions. If there is any difference in what the lawyers  
23 say about the law and what I tell you in my final instructions,  
24 you must follow my final instructions.

25 Ms. King, you're invited to give your closing

1 argument.

2 MS. KING: Thank you, Your Honor.

3 Ladies and gentlemen of the jury, on October 23,  
4 2012, Atiba Warren heard that his cousin had been stabbed and  
5 he went and he grabbed his gun, this gun.

6 As Judge Hornak explained to you a little bit  
7 yesterday morning and as he is going to explain to you further  
8 this afternoon, there are three elements that the government  
9 has to prove to you in order for you to find that the defendant  
10 knowingly possessed that gun on October 23, 2012, in violation  
11 of federal law.

12 As I explained to you yesterday, there are a couple  
13 of stipulations in this case. Two of these elements, they  
14 aren't even in dispute. The first one and the third one, those  
15 aren't in dispute. What you need to consider when you go back  
16 to the jury room and you think about the evidence, you need to  
17 focus on that second element, and that is, whether on October  
18 23, 2012, the defendant knowingly possessed that gun. I submit  
19 to you that when you do go back to the jury room and you do sit  
20 down and start to deliberate and discuss all of the evidence  
21 that you've heard, the testimony from the witnesses, reviewing  
22 all of the exhibits that are going to go up to the jury room  
23 with you, you're only going to be able to reach one conclusion  
24 and that is that the defendant knowingly was in possession of  
25 this firearm on October 23, 2012.

1                   So let's just talk about the evidence that you  
2 heard.

3                   You heard from three witnesses from the government.  
4 You heard from two police officers that were City of Pittsburgh  
5 police officers at the time this incident occurred.

6                   The first one was Officer Steven Sywyj. He came in  
7 and he sat down and he told you what happened on that day. He  
8 told you how he was working in Zone 5 out in the East End of  
9 Pittsburgh, driving around around ten o'clock at night when he  
10 gets a call, a service call for somebody stabbed. So, he puts  
11 on his lights and sirens and drives to 520 Lincoln Avenue.  
12 He's going to assist in the stabbing and to do some  
13 investigations into that stabbing. That's why he's going.

14                   He arrives and he told you what he saw when he got  
15 there. He sees Mr. Duwane Hayes laying on the floor stabbed,  
16 bleeding and DeShawn Weathers helping out and rendering aid to  
17 the victim. And the victim was in pretty bad condition,  
18 according to Mr. Sywyj, and according to other witnesses you  
19 heard from. If the medics didn't arrive soon, who knows what  
20 would have happened to him. But the medics did arrive. They  
21 did arrive and they were able to take over from DeShawn  
22 Weathers the care for Duwane Hayes.

23                   At that point, understandably, DeShawn Weathers is  
24 distraught, he's upset, his friend has been stabbed, and he  
25 wants to go inside and he wants to tell the victim's mother

1 what happened.

2           So, Officer Sywyj says, sure, fine, you go ahead and  
3 you do that. I need to talk to you some more because you were  
4 a witness to this stabbing. You saw what happened and I need  
5 to get some information from you and so I'm going to stand  
6 right here at the door and watch you as you go inside. That's  
7 what he did.

8           Estelle Hayes told you that. She told you that's  
9 where he was standing, right at the door. Officer Sywyj told  
10 you that. As he's standing there at the door, furthering this  
11 investigation of the stabbing. All of a sudden, he sees the  
12 defendant, Atiba Warren, in the doorway. He had a straight  
13 view. You saw from all of the exhibits, you saw from the  
14 exhibits from the government, the photographs of the inside of  
15 the house, you saw from the exhibits from the defense, the  
16 rendering, from that door, you can see straight back through to  
17 the kitchen. In that left-hand archway between the living room  
18 and the dining room, Officer Sywyj sees Atiba Warren holding  
19 this gun at chest level, and they made eye contact. Officer  
20 Sywyj told you that. Officer Sywyj shouts "gun" to alert  
21 everybody that is behind him, all of the other 11 or so  
22 officers that are there, they're investigating that stabbing,  
23 oh, my gosh, there's a gun here. We have a new situation,  
24 there's a new crime that is going on. You need to know it.  
25 Then he starts sending everybody out of the house.

1           As he's making eye contact with Atiba Warren, he  
2 ducks behind that partition wall that you saw there in the  
3 pictures and the rendering, that fireplace wall, he ducks  
4 behind there and he appears seconds later in the other doorway,  
5 no gun. As Officer Sywyj is sending them out of the house,  
6 where is the gun? He says, oh, it was just a toy.

7           So Officer Sywyj goes into the dining room  
8 immediately, looks around, lo and behold on the table, that  
9 gun. There it is. There's no toy. He told you he searched  
10 around, he didn't see a toy. What he saw was that. He picked  
11 it up and he saw that the serial numbers were obliterated. He  
12 called for Mr. Warren to be put under arrest, and he was.

13           At that same time, Lance Hoyson is there. You heard  
14 from him. He told you how he also received that call for  
15 service for somebody stabbed. He shows up and his role is to  
16 assist the medics with getting the victim into the ambulance  
17 un. After he's done that, he's here to investigate the  
18 stabbing. He's here to investigate this violent crime that  
19 occurred. So he does that. He starts looking around. He  
20 starts to see if he can see any evidence around. Then he hears  
21 "gun." Just as Officer Sywyj said. Just as Estelle Hayes said  
22 she heard, "gun." So he goes to assist his colleague. He goes  
23 inside. He sees where Officer Sywyj goes to the dining room to  
24 collect that firearm. Then he hears what turns out to be a  
25 television, he is not sure what it is, it could be somebody

1 else, so he goes upstairs to investigate and there's nobody  
2 else there. There's nobody else there. He goes back outside.

3 Now they have two investigations. They have the  
4 stabbing and they have this firearm that has been recovered  
5 with an obliterated number.

6 He goes to interview the defendant. The defendant  
7 is already in the police car. The Officer Hoyson told you how  
8 he got into the car. He starts putting the defendant's  
9 identifiers in his computer there. He turns around and he  
10 reads the defendant his Miranda warnings. He tells him that he  
11 has a right to a lawyer. He tells him that he has a right to  
12 remain silent. He tells him that he doesn't have to talk to  
13 him. But he does talk to him. He says, I'll talk to you and  
14 I'll tell you, I heard my cousin got stabbed, and I went and I  
15 got my gun. The very same gun that you recovered, obviously,  
16 because it has the serial number obliterated. And I know that  
17 it's obliterated because I bought it that way on the street.  
18 That's what he says.

19 That's it. That's what happened that night. That's  
20 what they saw and that's what they heard.

21 Then the gun has to go off for testing. So you  
22 heard from William Best, who told you a lot of interesting  
23 things, but what he told you was that he shot this gun into the  
24 water tank and it fired. And that it worked. And that it is a  
25 firearm. And he told you that he was actually able to use acid



1 to get these serial numbers up. One here, here's one here and  
2 one here. That's what Mr. Best told you.

3 That's the government's case. That's the  
4 government's case.

5 Judge Hornak is going to tell you that when you go  
6 back to the jury room and when you deliberate, one of the  
7 things you need to do is use your common sense when you  
8 evaluate the evidence in this case, your lifetime experience,  
9 use your common sense. I ask you, what does your common sense  
10 tell you happened here? The defendant heard that his cousin  
11 was stabbed, he went and got his gun, a gun that he bought on  
12 the street with the serial numbers already obliterated, and the  
13 gun he is not permitted to have because he's a convicted felon.

14 So, just briefly, to go over the elements with you,  
15 again, these are the three elements that the government has to  
16 prove. We have to prove each of them for you to be able to  
17 find the defendant guilty beyond a reasonable doubt.

18 Judge Hornak is going to go over these elements with you and  
19 he's going to send a copy of the jury instructions back with  
20 you to review in the jury room.

21 The first one is the prior conviction. I read to  
22 you yesterday that there's a stipulation here. This is not an  
23 issue. The parties agree about this. We agree that prior to  
24 October 23, 2012, the defendant was convicted of a crime in  
25 state court that is punishable by more than a year in prison.

1 That means that it's a felony. That is not in dispute. That's  
2 the proof.

3           The third element, interstate commerce. You heard  
4 me read that stipulation in yesterday, too. That's an element  
5 of this federal crime that the gun had to have at some point  
6 traveled in interstate or in foreign commerce, or in both.  
7 There's a stipulation here, too, as to that. This gun was  
8 manufactured in Brazil. It's actually stamped right on the  
9 gun, as you saw in the pictures. So in order to end up here in  
10 Pennsylvania on October 23, 2012, when it was recovered, that  
11 gun had to travel in interstate commerce at some point.  
12 There's a stipulation to that fact. That is not in dispute.  
13 This element is not in dispute.

14           The last one is knowing possession. I just went  
15 over with you all of the elements and all of the facts that go  
16 to this. But just to briefly reiterate, the fact that it's a  
17 firearm, we do have to prove that it's a firearm. William Best  
18 told you this gun is a firearm. He told you that.

19           We have to prove to you beyond a reasonable doubt  
20 that the defendant was in knowing possession of this firearm.  
21 The proof that I submit to you that we have offered is the  
22 testimony of Steve Sywyj, Officer Sywyj, who saw the defendant  
23 with this firearm in his hand and then recovered that firearm  
24 seconds later after the defendant exited the home.

25           You also heard the testimony of Officer Hoyson, who

1 told you that the defendant admitted to possessing this gun.  
2 Not only admitted to possessing this gun, but admitted to  
3 knowing certain elements this about this gun. He knew that the  
4 numbers were obliterated from this gun. Those are the  
5 defendant's admissions.

6           So, again, once you review all the evidence, and  
7 think about it and talk about it, and as Mr. Ortiz said that I  
8 would, I'm going to now ask you that after you go upstairs and  
9 review everything, that you do come back and return a verdict  
10 of guilty to the one count of this indictment, that the  
11 defendant was in knowing possession of that gun on October 23,  
12 2012. Thank you.

13           THE COURT: Thank you, Ms. King.  
14           Mr. Sindler.

15           MR. SINDLER: It wasn't that long ago that I was  
16 just talking to you about something that I'm going to bring up  
17 once again and, hopefully, the evidence has shown that this  
18 investigation ended as quickly as it had begun. And that's  
19 fine in many circumstances, but in the circumstances involving  
20 Atiba Warren, it is anything but because of the many things  
21 that didn't happen that perhaps should have happened.

22           I say that along the lines of something that I  
23 brought to your attention and referred to during my opening  
24 statement and that is, what kind of work do you do? Is it good  
25 work? Is it mostly good work? Is it barely passable? It is

1 the kind of work in which you cut corners?

2           Here, I suppose it is the kind of investigation  
3 conducted by both Mr. Sywyj, who is over there to your  
4 collective left sitting alongside Mr. Hoyson, an investigation  
5 that probably was thought never to have gone to trial, or be  
6 one that is as contested as it has been this week here in this  
7 federal courtroom.

8           Why? Well, Mr. Sywyj as a police officer, showed up  
9 to a much more serious event and said he saw Mr. Warren with a  
10 firearm. Didn't disarm him right away. Unlike what Ms. King  
11 had said a moment ago, I don't know that a crime was being  
12 committed, so let's give him the benefit of the doubt.  
13 Mr. Warren was with a gun, supposedly, there are 11 police  
14 officers outside that home at that moment, or about to be 11  
15 and given there is a gun in the midst of police officers, we'll  
16 also concede, rightfully so, that this person should not be  
17 having a gun in the presence of police officers, whether  
18 lawfully possessed or not.

19           So he doesn't disarm him. Says he saw him under  
20 certain conditions, which we'll talk about in a moment, and  
21 then Mr. Warren eventually comes out, makes no attempt to try  
22 to leave or be evasive or be threatening or menacing to  
23 anybody, and is eventually arrested. He's arrested because  
24 when the call goes out from Mr. Sywyj, he finds the gun and  
25 says that this man was holding it, he should, therefore, be

1 arrested. And moments later, I suppose, Mr. Warren was placed  
2 in the back of a car handcuffed.

3           Along comes Mr. Hoyson, who may have already been  
4 there at the time, and proceeds to get inside of the car and  
5 have a conversation, also uncorroborated because he was by  
6 himself, much like Mr. Sywyj was when looking inside of this  
7 home to which he had never been saying that Mr. Warren was  
8 holding a firearm.

9           Mr. Hoyson has a most remarkable conversation  
10 because he gets out of the car, goes over to Mr. Sywyj and  
11 said, you know what, it was like a hallelujah moment. This man  
12 just entirely and completely implicated himself in this  
13 firearm. He said he bought it off of the street. He said that  
14 he knew that when he bought it, it had an obliterated or  
15 defiled serial number, and that's it. We can mail this case  
16 in.

17           Sywyj is going to say, I saw it, Hoyson is going to  
18 say separately, I had a conversation with him. Together, we're  
19 going to make a case that is probably going to result in some  
20 kind of a guilty plea or some kind of a concession like that  
21 from the defendant, and we can move on to more important  
22 things, or perhaps matters of more gravity, such as that  
23 stabbing incident or whatever other matters come about.

24           Now, we're going to go over in a moment the material  
25 differences between what Mr. Sywyj, for starters, had between

1 what happened three years ago and what he's testified to six  
2 months ago as well as what he testified to this week.

3           A couple things to keep in mind. I think both men  
4 have admitted that they are, perhaps like a lot of us, were in  
5 a form-driven profession. They have accountability to the  
6 people they protect. They have accountability to their  
7 superiors, there is liability, and in cases like this, there is  
8 testimony. You have to be able to recall, despite the very  
9 many number of different incidents you investigate, matters  
10 that come to trial or that require recall.

11           The second thing with regard to recall would be  
12 this. It is human nature that as more time goes by -- at least  
13 it's true with me, I think it's true with other people with  
14 whom I have talked about this -- it is more difficult to recall  
15 something than you are able to closer in time to the event that  
16 is under thought or under discussion. We're going to see in a  
17 moment that the important things that were part of Mr. Sywyj's  
18 testimony six months ago, which would have been two and a half  
19 years after the incident, or just this week, which is a full  
20 three years after the incident, despite the passage of time,  
21 remarkably was operating under the influence of an improved  
22 memory, despite the fact that a report to which he was  
23 referring in some points didn't contain those matters that he  
24 felt were important enough to testify about.

25           When you look at Mr. Sywyj, you have two things to

1 consider. You have the report that he had done, which was just  
2 one, followed by his testimony.

3           The first thing that comes to our attention would be  
4 the following.

5           Mr. Warren, in a house to which Mr. Sywyj had never  
6 been, appears, disappears, and then later reappears on the  
7 floor in which supposedly he's moving around in a furtive way,  
8 trying, if you believe Mr. Sywyj, trying to remain outside of  
9 his field of observation. Nothing at all appears about that in  
10 his report, but remarkably the testimony he gives in this case,  
11 not only six months ago but here this week, suddenly includes  
12 that fact.

13           When you move on, you see that that isn't the only  
14 thing he was remarkably able to remember, despite the passage  
15 of time.

16           Mr. Warren had yet a second discussion with a police  
17 officer that night before apparently the one that he had with  
18 Mr. Hoyson where he refers to the gun as a toy. I would think  
19 if I'm a police officer for the years that he had been serving  
20 as a police officer at that time, that if that conversation had  
21 actually occurred, it would be part of his police report.  
22 Unless, of course, the kind of work that he does and the kind  
23 of investigation that we're talking about isn't quite as good  
24 as it should be for the kind of work that he's doing.

25           You move on and you see that there's one thing that

1 Mr. Sywyj did get correct, at least he was consistent about it,  
2 and that concerned the number of people inside of the house.  
3 He said in his report there were several people behind whom  
4 Mr. Warren was supposedly standing. He testified to it several  
5 months ago, testified to it again this week.

6           The difficulty that you have to have with that when  
7 you consider the number of people around whom they say  
8 Mr. Warren was standing is a woman named Estelle Hayes.

9           Now, true, you have two different people here who  
10 have two very different vested interest in this case.

11           The police's vested interest is quite obvious, they  
12 have done an investigation. For the fruits of their labors  
13 they would nearly demand, I would say, if not compel, a verdict  
14 that is guilty.

15           Estelle Hayes would have a vested interest because,  
16 of course, as you heard, she was somebody who was having Mr.  
17 Warren in as a boarder at 520 Lincoln Avenue.

18           So why should Ms. Hayes be somebody who is more  
19 believable on this point about something that maybe as  
20 insignificant as the number of people in the house when, of  
21 course, in order to make Mr. Sywyj's story work, you have to  
22 have several people in the house because those are the people  
23 behind whom Mr. Warren was supposedly hiding or standing or  
24 trying to shield himself at times where he was trying to look  
25 inside of the home.



1 Well, I guess it must be police procedure, but one  
2 thing that they did very, very accurately, I suppose, is list  
3 the number and the names of the police officers who were there  
4 that night. There were 11, with Mr. Sywyj.

5 They also even included the vehicles by vehicle  
6 number in which all of these men had arrived in a support  
7 position or support role that night.

8 But if you look at Ms. Hayes' testimony, there's a  
9 diametrical difference between what she says and what Mr. Sywyj  
10 says and the number of people who are living there. There is  
11 DeShawn Weathers who does come into the house at some point.  
12 But if Ms. Hayes, as the defense and prosecution testimony  
13 tended to show, was standing at the same front door with the  
14 police officer. DeShawn Weathers is somewhere inside of the  
15 house. We're not sure if it was deep as the dining room in  
16 which Mr. Sywyj says he saw Mr. Warren. There was nobody else  
17 in the house. So why would it be something that is that  
18 important to list in a report and testify about, that there  
19 were several, presumably, family members present when he saw  
20 Mr. Warren.

21 The point of this part of the exercise, folks, is  
22 this. If you tend to believe or find, rather, that the  
23 testimony of somebody in important parts doesn't strike you as  
24 believable or credible, you're entitled, you don't have to, but  
25 you're entitled to not believe some or all of the testimony

1 given by that person in this courtroom.

2           So, once the home is evacuated, Mr. Warren comes  
3 outside and acts in a way that is entirely contrary to somebody  
4 who has just committed the offense that Mr. Sywyj claimed he  
5 did. He wasn't trying to leave, and remember he probably  
6 couldn't because at this point there are probably seven police  
7 cars in or near the front of 520 Lincoln Avenue responding to  
8 the more serious event that night. That is the only means of  
9 escape. So while he's standing on the front porch or the front  
10 yard of the home, there is no testimony about Mr. Warren  
11 resisting arrest, trying to make himself scarce, trying to  
12 hide, threatening, or menacing anybody. In fact, for all we  
13 know, he peacefully surrendered upon being told to place his  
14 hands behind his back and then being placed in a cruiser for  
15 eventual transportation for processing.

16           But before he leaves, we then have the additional  
17 phase here, which is the Hoyson interview inside the car. Now,  
18 the supposed statement was taken by a different person than  
19 Mr. Hoyson or then Mr. Sywyj, and we have a similar situation  
20 brewing here where it is just one person talking to him, even  
21 though Mr. Hoyson did arrive with another officer. I think  
22 someone had field training upon their arrival at 520 Lincoln  
23 Avenue. Mr. Warren is already handcuffed behind his back. I  
24 think we can all agree that if we're in that position, we can't  
25 do any writing of any kind. So it's really unfair to our

1 common sense and it's unfair to our sense of judgment to think  
2 that it's impractical for a police officer to have somebody  
3 sign a rights form that wasn't even available in the first  
4 place when it's that officer, or somebody like him, who placed  
5 my client in the situation and position that he was in, which  
6 was making it impossible to sign anything, let alone that  
7 rights for.

8           But there is a way for Mr. Hoyson to get around that  
9 he says, because he also says, you know what, I did talk to him  
10 about his rights. You don't have to talk to me if you don't  
11 want to. If you do talk to me, whatever you say, it's going to  
12 be used against you. You can remain silent. If you need or  
13 want to talk with a lawyer before you go forward with me, we  
14 can try to make one available.

15           Then imagine, Mr. Hoyson says in a hallelujah  
16 moment, Mr. Warren took the fall for this firearm in ways that  
17 are just impossible to overcome. He bought it on the street.  
18 He bought it knowing that it had defiled serial numbers, and  
19 it's the same weapon that was taken from the house.

20           He gets out of the car, walks over to where  
21 Mr. Sywyj is and says, you know what, I just had the most  
22 remarkable conversation with this man, he implicated himself  
23 and why don't you just make it part of your report while you're  
24 at it.

25           So, it was also I guess impractical for Mr. Hoyson

1 to do a report regarding what -- and Ms. King just said it,  
2 it's a very important part of this case, you know what, I took  
3 the statement, you, Mr. Sywyj, weren't there when it was done,  
4 but you know what, just make it part of your report. Again,  
5 leading me to ask, what kind of work do you do? Is it good  
6 work? Or is it other than good work in the profession that you  
7 care to work in.

8           Now, before I had a chance to, the government  
9 brought up something that might be on some of our minds. That  
10 is the fingerprints situation. There weren't any. I would  
11 agree that if you want to believe Mr. Sywyj or at least believe  
12 his story, why would someone like that under those  
13 circumstances have a gun like that submitted for fingerprints  
14 when all you got to do is believe me, I'm a police officer,  
15 Steven Sywyj, and know that I saw him with it, and nothing more  
16 needed to be done.

17           But we also know that the environmental factors that  
18 Bill Best referred to were probably not present to degrade the  
19 possibility of Mr. Warren's prints, if they appeared on that  
20 weapon, at the place where or from the place at which the gun  
21 was found. The gun wasn't subjected to weather conditions, so  
22 it wasn't like weather conditions would have degraded any  
23 prints that he was holding, that he may have left on that  
24 firearm. There wasn't some dog or cat in the home that came  
25 along and rubbed up against the weapon or may have licked the

1 weapon to degrade the fingerprints that were found on that  
2 weapon. But it was only up to him because Best can't request  
3 evidence. It is the investigator through whom evidence is  
4 submitted for that kind of test. Now, I would suggest that one  
5 environmental degradation that occurred was Mr. Sywyj placing  
6 his hand on the gun when he seized it. I can't hear any  
7 testimony about him having gloves or something of the nature by  
8 which evidence of that sort would be handled because he was  
9 already of the belief, you know what, this is my story, I'm,  
10 sticking to it, that being I saw him with it, therefore, he had  
11 it, done. We can mail in this conviction and add on to that  
12 the Hoyson statement that was supposedly taken from inside of  
13 that car.

14 I had prepared through the use of others this  
15 isometric drawing. I'm showing you right now what is known as  
16 Exhibit K in this case. I did so to give you a couple of  
17 different perspectives of the place at which this incident  
18 occurred because the government, for reasons that are not known  
19 to me, didn't do so. It's their crime scene, but I brought  
20 along somebody else to recreate it through this exhibit. It  
21 will be upstairs for you to look at and that sort of thing.

22 One thing I'd ask you to keep in mind is that in the  
23 course of this case, one of the reasons, aside from the  
24 inconsistencies of Mr. Sywyj's version of the events in this  
25 case have to be looked at some scrutiny is the conditions under

1 which he was looking. This home, at least the top-down version  
2 of Exhibit K doesn't give you that sense because for all we  
3 know, it's full daylight from what we can see there. But in  
4 the area that goes from the front door, through the foyer,  
5 through the upper part of the front room and into that  
6 passageway were conditions where the visibility was, at best  
7 poor, visibility, at worst, was non-existent at a place to  
8 which Mr. Sywyj had never been, around people he had never met  
9 beforehand. I don't need to go into what it's like when you  
10 can't see through the lack of either natural or artificial  
11 light, but those are the conditions under which he was  
12 operating. But he would have you believe this black weapon  
13 under dark circumstances, with a man holding the gun at a 45  
14 degree angle across his chest, able for probably any adult who  
15 was the size of Mr. Sywyj to be able to see. It has to work  
16 that, you understand, because if the gun is down by his side,  
17 no matter whether there are people there or not, harder to see,  
18 if the gun is partially obstructed, behind his back, in full or  
19 in part, harder, if not impossible, to see.

20           It reminds me of a magazine involving a famous actor  
21 or actress, pick any Swiss watch, Swiss-made watch you want.  
22 There's the wrist watch across your wrist and that's what he  
23 was doing. Mr. Warren, if you believe Mr. Sywyj, was like part  
24 of an ad. He was holding it up, making sure that whoever was  
25 in that doorway would be able to see that he was holding a

1 firearm at that time. Does your common sense tell you that  
2 that was the case at that time?

3           We added three more versions of this isometric,  
4 which is Exhibits L, M and N to give you a sense of distance  
5 and proportion because looking at K, you don't get that.  
6 Mr. Sywyj, if you believe his version, would tell you that  
7 there was approximately, I'm not saying exactly, but there was  
8 approximately 18 feet of darkness through which he was able to  
9 see Mr. Warren supposedly holding this gun.

10           We added two more dimensions, M and N, because M,  
11 would show you the middle of that room, or thereabouts, not the  
12 middle of the room but the middle of the area that would have  
13 been traveled from the bottom of those stairs to the passageway  
14 around which Mr. Sywyj said that he saw Mr. Warren.

15           The next one, which is Exhibit N, would just show  
16 you the distance for somebody standing or in the area directly  
17 in front of the staircase.

18           What kind of work are you doing? Is it good? Or is  
19 it less than good?

20           You already know I'm a baseball fan. I'm going to  
21 hit you with one more, and I promise you it's the last one.  
22 Warren Spahn is the winningest pitcher in Major League Baseball  
23 history. To this day, the record books still show him with the  
24 most wins in Major League history. He was on the mound one day  
25 at the old Polo Grounds in New York City facing a batter named

1 who? Willie Mays. At that time, Willie Mays was 0 for 12 in  
2 his first dozen at bats. Spahn is on the mound, 60 feet 6  
3 inches from home plate at which Mays is standing and before you  
4 know it, Willie Mays hammers his first home run of his major  
5 league career.

6           Reporters gather around Warren Spahn's locker after  
7 the game. They're eager to know the answer to the following  
8 question. What kind of pitch did you throw Mays? Spahn  
9 doesn't hesitate in the answer. One that was perfect for the  
10 first 60 feet.

11           I can't tell you how important the burden of proof  
12 beyond a reasonable doubt is in this case. I always do this.  
13 I have spoken in front of many other juries in my career. I  
14 say the same thing every single time. It is a bedrock  
15 principle of our system of justice, which is second to none  
16 anywhere on this planet. Some of you are going to be thinking  
17 when whether or not the government in this case has met its  
18 burden some of the following thoughts. One, he didn't do it.  
19 Well, that's very easy, if he didn't do it, your vote is very  
20 clear, your vote is not guilty.

21           If you're thinking, well, I'm not that certain he  
22 didn't do it, I'm just pretty sure he didn't do it. He's not  
23 guilty.

24           Go a little farther toward the middle there. He  
25 probably didn't do it. He might have, but he probably didn't.



1 Your verdict is not guilty.

2           Now, we're past the middle and toward the area where  
3 the government wants you to be. I'm pretty sure that he did  
4 it. I'm pretty sure that Mr. Warren committed the offense on  
5 which he stands indicted. Worse yet, because we're getting  
6 really close now if you're the government, he did it. He  
7 definitely did it, but the government didn't prove it. If he  
8 did it, but the government didn't prove it, it's not guilty.  
9 Because not proven, in this case, like any other one, is not  
10 guilty.

11           We're at that street corner, folks. I figuratively  
12 mentioned it to you yesterday. You're at some intersection  
13 that is controlled or not controlled by some mechanical device,  
14 like a light, like a stick figure, or some crossing guard  
15 perhaps, I don't know. You're getting ready to cross the  
16 street, before you do so, you look over. You recognize some  
17 people across the way on the other side. They look familiar.  
18 Name is Chris Sciulli, could be Jonathan Ortiz, could be  
19 Ms. King. You might even see with them Mr. Hoyson or  
20 Mr. Sywyj. Some or all of them are over there. Whoever is  
21 over there, they're going to be waving, waving at you saying,  
22 you know what, it's all right, it's all right to come over.  
23 Come over and cross the street right now and join us.

24           Before you do so, before you step off that curb,  
25 you're looking both ways, you're looking one way, and whether

1 it's one way or both ways, you are expressing reasonable doubt.  
2 It's the same reasonable doubt that you have as a result of  
3 this less than or second-rate prosecution. With that, your  
4 verdict has to be that of not guilty.

5 THE COURT: Thank you, Mr. Sindler.

6 Ms. King or Mr. Ortiz.

7 MS. KING: Thank you, Your Honor.

8 Ladies and gentlemen, I'm just going to touch on two  
9 main points.

10 First of all, credibility. Mr. Sindler is  
11 essentially asking you to find that those two officers are  
12 lying to you. But that's not for him to tell you and it's  
13 certainly not for me to tell you, it's for you to decide. The  
14 Judge is going to instruct you on that. You are the people  
15 that get to make the decision about the credibility of the  
16 witnesses, and you were able to sit here as they testified in  
17 front of you. The Judge is going to say to you that you may  
18 decide whether to believe a witness based on his behavior and  
19 the manner in which they testified and the explanations that  
20 they gave and all of the other evidence in this case.

21 What did you think of them when they testified? Did  
22 you think they were being evasive? Did you think they weren't  
23 answering questions? Or did you think they gave you an  
24 accurate depiction of what occurred that night? That's for you  
25 to decide when you go upstairs.

1           You also have to use that same standard when you  
2 evaluate Ms. Hayes' testimony. How did she appear to you? Did  
3 she appear confused? Did she appear that she couldn't  
4 accurately remember what happened that evening? You need to  
5 think about that when you go upstairs and evaluate everyone's  
6 testimony.

7           The second thing that I just briefly want to touch  
8 on is vantage point. Mr. Sindler is arguing that Officer Sywyj  
9 couldn't see Atiba Warren with a gun. Every single witness  
10 that testified before you that had any knowledge about that  
11 residence at all told you that from standing at the front door,  
12 you could not only see into the vestibule, you could not only  
13 see into the living room, you could not only see into the  
14 dining room where Mr. Warren had the gun, you could see all the  
15 way into the kitchen. You could see all the way through the  
16 house.

17           Ladies and gentlemen, when you go upstairs and you  
18 deliberate, I ask you to return a verdict of guilty in this  
19 case.

20           THE COURT: Thank you, Ms. King.

21           Ms. King and Mr. Sindler, it would be the Court's  
22 intention to allow the jury to have a brief ten-minute recess  
23 in the jury room to refresh themselves, and then when they  
24 return to the courtroom for the Court to provide its final  
25 instructions to the jury.

1 Is that procedure acceptable to you, Ms. King?

2 MS. KING: Yes.

3 THE COURT: Is that acceptable to you, Mr. Sindler?

4 MR. SINDLER: Yes.

5 THE COURT: Ladies and gentlemen of the jury, we're  
6 going to take about a ten-minute recess now and give you an  
7 opportunity to refresh yourselves.

8 Then when Mr. Babik has you come back down, the  
9 Court will give you, as noted, its final instructions to you,  
10 the twelve seated members of the jury. I will give some  
11 further direction. Alternates, of course, will also receive  
12 the final instructions in the event they would be called upon  
13 to deliberate. When the jury returns, after my final  
14 instructions, to the jury room, the alternates will remain in  
15 the courtroom for a moment while I give you some direction as  
16 to what will happen next relative to your service.

17 So, ladies and gentlemen, this is going to be the  
18 last time that I give you exactly this instruction.

19 During this recess, you should not seek out or  
20 receive any information regarding this case, those  
21 participating in it or any issues or matters regarding the case  
22 at all.

23 You should not discuss any matters regarding this  
24 case, those involved in it or the issues involved in it with  
25 any other person, including amongst yourselves. That time will

1 come in just a few minutes.

2 And lastly, should anyone attempt to discuss any of  
3 those things with you, I would ask that you bring them promptly  
4 to Mr. Babik's attention.

5 With that, you can assist the jury, Mr. Babik.

6 MR. BABIK: All rise for the jury.

7 (Jury is dismissed from the courtroom.)

8 THE COURT: Please be seated, everyone.

9 It's my intention once the twelve-seated jurors are  
10 taken upstairs to begin their deliberations, it appears one of  
11 the alternates is a resident of Allegheny County, the other is  
12 a resident of Westmoreland County, it's my intention to not  
13 discharge them from jury duty or jury service until a verdict  
14 has been rendered and received, but to also excuse them from  
15 the courtroom so they're no longer present here, and to advise  
16 them after today, should proceedings be continuing after today,  
17 that they need not return to the courthouse.

18 Now I can, and I'm happy to have them come back to  
19 the courthouse and they would have to be in the jury room  
20 downstairs, we would not have them up here during whenever  
21 deliberations are going on.

22 Ms. King or Mr. Ortiz, do you have any thoughts  
23 regarding any of that?

24 MS. KING: They can definitely go home, Your Honor.

25 THE COURT: Mr. Sindler, any thoughts?

1 MR. SINDLER: I feel like I'm the bad guy, Judge.

2 THE COURT: There is no good guy or bad guy, we're  
3 all doing our job.

4 MR. SINDLER: I don't know. The case may very well  
5 be decided today.

6 THE COURT: Or may not.

7 MR. SINDLER: There was a premonition on your part,  
8 it sounded like, because it sounded like you were not going to  
9 give the admonition that you had been because if they are going  
10 home tonight --

11 THE COURT: Everyone gets the admonition until the  
12 jury is discharged because a verdict has been rendered.

13 MR. SINDLER: I don't have any basis to believe that  
14 one of the twelve will become unavailable if this case goes  
15 beyond today, but I prefer to have both back.

16 THE COURT: I'll take it under advisement.

17 I have given you copies of the instructions. At the  
18 appropriate point in the instructions, Mr. Babik will show the  
19 jury, each of the twelve members of the jury, a copy of the  
20 verdict form. He'll collect it back up before they go  
21 upstairs, but that way they can each see it, hold it and look  
22 at it while I'm explaining it. He will then deliver upstairs  
23 an envelope, along with the verdict form that they will use to  
24 complete the verdict.

25 He also provides them with some paper and other

1 envelopes in case they have a question for the Court, that  
2 gives them a mechanism to do that.

3           Mr. Greer, what we'll do is call down to the jury  
4 room and make sure that there is someone down there available  
5 if we need to send the alternates down for the balance of the  
6 day. Then we'll take care of getting their contact information  
7 from them.

8           It would also be my intention once the jury goes up  
9 and the alternates have left the courtroom, Mr. Fox will be up,  
10 we'll swear him in as the jury bailiff.

11           Mr. Babik will confirm with all counsel the content  
12 of the exhibits that he will then take up to the jury room,  
13 along with Mr. Fox, along with the clean computer, which is  
14 here. You're welcome to examine it. I'll make sure Mr. Fox  
15 under oath tells us that it's a clean computer, and then he'll  
16 go up and explain, if they do want to use the thumb drive,  
17 where to put it in and how to use that.

18           Is that all agreeable with you, Ms. King?

19           MS. KING: Yes, Your Honor.

20           THE COURT: Is that agreeable with you, Mr. Sindler?

21           MR. SINDLER: Yes.

22           THE COURT: With that, Mr. Greer we'll adjourn the  
23 Court.

24           MS. KING: Detective Sciulli actually has to leave  
25 for the day, so we do have an ATF agent who can take custody of

1 the gun, he's in plainclothes, so he will have the gun  
2 available if the jurors want to look at it.

3 THE COURT: My thought is if during the course of  
4 deliberations, whenever it might be, the jury advises the Court  
5 that they want to see Government Exhibit 1, we would make sure  
6 counsel is notified, come back over if you want, and we would  
7 have Government Exhibit 1 returned to the courtroom and then  
8 two of my jury bailiffs, Mr. Babik and Mr. Greer, would deliver  
9 it up to the jury room and remain outside while they examined  
10 it.

11 Is that agreeable with you, Ms. King?

12 MS. KING: Yes.

13 THE COURT: Is that agreeable with you, Mr. Sindler,  
14 if it comes up?

15 MR. SINDLER: Yes.

16 THE COURT: Mr. Greer.

17 MR. GREER: All rise.

18 (Whereupon, there was a brief recess in the proceedings.)

19 THE COURT: Ms. King and Mr. Ortiz, can we bring the  
20 jury back in?

21 MS. KING: Yes.

22 THE COURT: Mr. Sindler?

23 MR. SINDLER: Yes.

24 THE COURT: Note that all trial participants are  
25 present.



1           Mr. Babik, you can bring the jury down.

2           (Jury enters the courtroom.)

3           THE COURT: Ms. Kienzle, if you'd make a note that  
4 all twelve seated members of the jury and our two alternate  
5 jurors have returned to the courtroom.

6           All trial participants as previously noted remain in  
7 the courtroom.

8           Members of the jury, now that you've heard and seen  
9 all of the testimony and evidence presented in this trial, it  
10 becomes my duty as the judge to give you instructions  
11 concerning the law applicable to this case. You will be  
12 provided copies of these instructions in the jury room during  
13 your deliberations, so to the extent that you're taking notes,  
14 don't feel compelled to take notes during these oral  
15 instructions, but you may certainly do so if you choose to do  
16 that.

17           You have two duties as a jury. Your first duty is  
18 to decide the facts of this case from the testimony and  
19 evidence that you've heard and seen in court during this trial.  
20 That is your job and yours alone. I play no part in finding  
21 the facts. You should not take anything I may have said or  
22 done during the trial as indicating what I think of the  
23 evidence or what I might think about what your verdict should  
24 be.

25           Do not attempt to interpret my rulings on evidence

1 as somehow indicating who I believe should prevail in this  
2 case. Upon allowing testimony or other evidence to be  
3 introduced over the objection of an attorney, the Court does  
4 not indicate any opinion as to the weight or effect of such  
5 evidence. As stated before, you, the jurors, are the sole  
6 judges of the credibility of all witnesses and the weight and  
7 effect of all evidence.

8           Your second duty is to apply the law upon which I  
9 instruct you to the facts as you find them to be. I will now  
10 explain to you the legal principles that must guide you in your  
11 decision. You must apply my instructions carefully. Each of  
12 the instructions is important and you must apply all of them.  
13 You must not substitute or follow your own notion or opinion  
14 about what the law is or ought to be. You must apply the law  
15 that I give to you, whether you agree with it or not. It would  
16 be a violation of your sworn duty as jurors to base a verdict  
17 on any view of the law other than that given in these  
18 instructions of the Court, just as it would also be a violation  
19 of your sworn duty as judges of the facts to base a verdict  
20 upon anything other than the proven evidence in the case.

21           Whatever your verdict is, it will have to be  
22 unanimous. All of you will have to agree on it or there will  
23 be no verdict. In the jury room, you are to discuss the case  
24 amongst yourselves, but ultimately each of you will have to  
25 make up your own mind. This is a responsibility that each of

1 you as an individual has and a responsibility you cannot avoid.

2           During your deliberations, you must not communicate  
3 with or provide any information to anyone by any means about  
4 this case. You may not use any electronic device or media,  
5 such as the telephone, cell phone, Smartphone, iPhone,  
6 Blackberry or computer, the Internet, any Internet service, any  
7 text or instant messaging service, any Internet chat room, blog  
8 or website such as Facebook, Snapchat, Instagram, LinkedIn,  
9 YouTube or Twitter to communicate to anyone any information  
10 about this case or to conduct any research about this case  
11 until I accept your verdict. In other words, you can't talk to  
12 anyone on the phone, correspond with anyone or electronically  
13 communicate with anyone about this case. You can only discuss  
14 the case in the jury room with your fellow jurors during your  
15 deliberations.

16           You may not use these electronic means to  
17 investigate or communicate about the case because it's  
18 important that you decide the case based solely on the evidence  
19 presented in this courtroom. You are only permitted to discuss  
20 the case with your fellow jurors during deliberations because  
21 they have seen and heard the same evidence you have. In our  
22 judicial system, it is important that you are not influenced by  
23 anything or anyone outside of this courtroom.

24           Perform these duties fairly and impartially. Do not  
25 allow sympathy, prejudice, fear, or public opinion to influence

1 you. You should also not be influenced by any person's race,  
2 color, religion, national ancestry, gender, sexual orientation,  
3 profession, occupation, celebrity, economic circumstances or  
4 position in life or in the community.

5           During the trial, each of you was supplied with a  
6 notebook for the purpose of taking notes. You should remember  
7 that notes taken by any juror are not evidence in the case and  
8 must not take precedence over your independent recollection of  
9 the testimony and the evidence presented during the trial.

10 Notes are only an aid to your recollection. They're not  
11 entitled to any greater weight than that which the evidence  
12 actually is. Any notes taken by any juror concerning this case  
13 should not be disclosed to anyone other than a fellow juror.

14           You are not obligated to take notes. If you did not  
15 take notes, you should not be influenced by the notes of  
16 another juror, but you should rely upon your own recollection  
17 of the evidence.

18           If any reference by the Court or by counsel to  
19 matters of testimony or exhibits does not coincide with your  
20 own recollection of that evidence, it is your recollection  
21 which should control during your deliberations and not the  
22 statements of the Court or of counsel. You are the sole judges  
23 of the evidence received in this case.

24           The word "evidence" has been used extensively in  
25 this case. You must make your decision in the case based only

1 on the testimony, exhibits and stipulations you heard and saw  
2 in the courtroom. Do not let rumors, suspicions or anything  
3 else that you may have seen or heard outside of court influence  
4 your decision in any way.

5           The evidence from which you are to find the facts  
6 consists of the following:

7           A, the testimony of witnesses.

8           B, documents, photographs, or other things admitted  
9 into evidence as exhibits.

10           C, any fact or other witness testimony that was  
11 stipulated, that is, formally agreed to by the parties.

12           The following are not evidence:

13           The indictment. Please remember that the indictment  
14 is simply the description of the charge made by the government  
15 against Mr. Warren. But it is not evidence that he committed a  
16 crime. You should also remember that Mr. Warren has pleaded  
17 not guilty to the charges.

18           Statements and arguments of the lawyers for the  
19 parties this case are not evidence.

20           Also, not evidence are questions by the lawyers and  
21 questions that I might have asked.

22           Objections by lawyers and especially including  
23 objections in which a lawyer stated facts are not evidence.

24           Further, any testimony I struck or told you to  
25 disregard is not evidence and anything you may have seen or

1 heard about this case outside the courtroom is not evidence.

2 Ladies and gentlemen, you should use your common  
3 sense in weighing the evidence. Consider it in light of your  
4 everyday experience with people and events and give such  
5 evidence whatever weight you believe it deserves. If your  
6 experience and common sense tells you that certain evidence  
7 reasonably leads to a conclusion, you may reach that  
8 conclusion.

9 As I told you in my preliminary instructions, the  
10 rules of evidence control what can be received into evidence.  
11 During the trial, the lawyers objected when they thought that  
12 evidence was being offered that was not permitted by the rules  
13 of evidence. These objections simply meant that the lawyers  
14 were asking me to decide whether the evidence should be allowed  
15 under the rules. You should not be influenced by the fact that  
16 an objection was made. It's the duty of the attorney on each  
17 side of the case to object when the other side offers testimony  
18 or other evidence which the attorney believes is not properly  
19 admissible. You should not hold it against an attorney or  
20 their client because the attorney has made objections. You  
21 should also not be influenced by my rulings on objections or  
22 any sidebar conferences you may have overheard. When I  
23 overruled an objection, the question was answered, or the  
24 exhibit was received as evidence and you should treat that  
25 testimony or exhibit like any other. When I allowed evidence

1 for a limited purpose only, I instructed you to consider that  
2 evidence only for that limited purpose and you must do just  
3 that.

4           When I sustained an objection, the question was not  
5 answered or the exhibit was not received as evidence. You must  
6 disregard the question or the exhibit entirely. Do not think  
7 about or guess what the witness might have said in answer to  
8 the question. Do not think about or guess what the exhibit  
9 might have shown. Sometimes a witness may have already  
10 answered before a lawyer objected or before I ruled on the  
11 objection. If that happened and if I sustained the objection,  
12 you must disregard the answer that was given.

13           Also, if I ordered that some testimony or other  
14 evidence be stricken or removed from the record, you must  
15 disregard that evidence. When you're deciding this case, you  
16 must not consider or be influenced in any way by the testimony  
17 or other evidence that I told you to disregard.

18           Although the lawyers may call your attention to  
19 certain facts or factual conclusions that they thought were  
20 important, what the lawyers say is not evidence and is not  
21 binding on you. It is your own recollection and interpretation  
22 of the evidence that controls your decision in this case.

23           Also, do not assume from anything I may have done or  
24 said during the trial that I have any opinion about any of the  
25 issues in this case or about what your verdict should be.

1           As I told you in my preliminary instructions, ladies  
2 and gentlemen, you may consider direct evidence and  
3 circumstantial evidence. You may use both types of evidence in  
4 reaching your verdict.

5           Direct evidence is simply evidence which, if  
6 believed, directly proves a fact. An example of direct  
7 evidence occurs when a witness testifies about something the  
8 witness knows from his or her own senses. Something the  
9 witness has personally experienced, has individually seen,  
10 touched, heard or smelled.

11           Circumstantial evidence is receive which, if  
12 believed, indirectly proves a fact. It is evidence that proves  
13 one or more facts from which you could reasonably find or infer  
14 the existence of some other fact or facts. A reasonable  
15 inference is simply a deduction or conclusion that reason,  
16 experience, and common sense lead you to make from the  
17 evidence. A reasonable inference is not a suspicion or a  
18 guess. It is a reasoned, logical decision to find that a  
19 disputed fact exists on the basis of another fact.

20           Remember my rain example. Although you can hardly  
21 see outside from this room, if one or more people walked in  
22 with a wet trench coat or a dripping umbrella, it would be  
23 reasonable and logical to conclude from that circumstantial or  
24 indirect evidence that it had been raining outside. You would  
25 not have to find that it was raining, but you could.



1           Sometimes different inferences may be drawn from the  
2 same set of facts. The government may ask you to draw one  
3 inference and the defense may ask you to draw another. You and  
4 you alone must decide what reasonable inferences you will draw  
5 based on all the evidence and your reason, experience and  
6 common sense.

7           You should consider all the evidence that is  
8 presented in this trial, direct and circumstantial. The law  
9 makes no distinction between the weight that you should give to  
10 either direct or circumstantial evidence. It requires only  
11 that you weigh all of the evidence before you may return a  
12 verdict. It is for you to decide how much weight to give to  
13 any evidence.

14           Your decision on the facts in this case should not  
15 be determined by the number of witnesses testifying for or  
16 against a party. The number of witnesses who testify for one  
17 side or the other is not controlling. The weight of the  
18 evidence also does not necessarily depend on the quantity of  
19 evidence presented. What is more important than numbers or  
20 quantity is how believable the witnesses were and how much  
21 weight you think their testimony deserves. You must consider  
22 all of the evidence and determine what the facts are and  
23 whether the government has proven its case and all the elements  
24 thereof as I will define them beyond a reasonable doubt.

25           In order to arrive at the true facts and draw the

1 reasonable and proper inferences therefrom, you must decide  
2 what testimony you believe and what testimony you do not  
3 believe. You are the sole judges of the credibility of the  
4 witnesses. Credibility refers to whether a witness is worthy  
5 of belief. Was the witness truthful? Was the witness'  
6 testimony accurate? You may believe everything a witness says  
7 or only part of it or none of it.

8           You may decide whether to believe a witness based on  
9 his or her behavior and manner of testifying, the explanations  
10 the witness gave and all the other evidence in the case, just  
11 as you would in any important matter where you try to decide if  
12 a person is truthful, straightforward, and accurate in his or  
13 her recollection. In deciding the question of credibility,  
14 remember to use your common sense, your good judgment, and your  
15 experience.

16           In deciding what to believe, you may consider a  
17 number of factors; these include the opportunity and ability of  
18 the witness to see or hear or know the things about which the  
19 witness testified; the quality of the witness' knowledge,  
20 understanding and memory; the witness' appearance, behavior and  
21 manner while testifying; whether the witness has an interest in  
22 the outcome of the case or any motive, bias or prejudice; any  
23 relation the witness may have with a party in the case and any  
24 effect the verdict might have on the witness; whether the  
25 witness said or wrote anything before trial that was different

1 from the witness' testimony in court; whether the witness'  
2 testimony was consistent or inconsistent with other evidence  
3 that you believe; and any other factor that bears on whether  
4 the witness should be believed.

5           Inconsistencies or discrepancies in a witness'  
6 testimony or between the testimony of different witnesses may  
7 or may not cause you to disbelieve a witness' testimony. Two  
8 or more persons witnessing an event may simply see or hear it  
9 differently. Mistaken recollection, like failure to recall, is  
10 a common human experience. Weighing the effect of an  
11 inconsistency, you should also consider whether it was about a  
12 matter of importance or an insignificant detail. You should  
13 also consider whether the inconsistency was innocent or  
14 intentional.

15           You are not required to accept the testimony of a  
16 witness, even if the testimony was not contradicted and the  
17 witness was not impeached. You may decide that the witness is  
18 not worthy of belief because of the witness' bearing and  
19 demeanor or because of the inherent improbability of the  
20 testimony or for other reasons that are sufficient to you.

21           If you believe that a witness knowingly testified  
22 falsely concerning an important matter, you may distrust the  
23 witness' testimony concerning other matters. You may reject  
24 all of the testimony or may accept such parts of the testimony  
25 that you believe are true and give it such weight as you think

1 it deserves.

2           After you make your own judgment about the  
3 believability of a witness, you can then attach to the  
4 testimony of that witness the importance or weight that you  
5 think it deserves.

6           Although the government is required to prove the  
7 guilt of the defendant beyond a reasonable doubt, the  
8 government is not required to present all possible evidence  
9 related to the case or to produce all possible witnesses who  
10 might have some knowledge about the facts of the case. In  
11 addition, the defendant is not required to present any evidence  
12 or produce any witnesses at all.

13           The rules of evidence ordinarily do not permit  
14 witnesses to state their own opinions about important questions  
15 in a trial, but there are exception to these rules. In this  
16 case, you heard testimony from William Best and Travis Johnson.  
17 Because of his knowledge, skill, experience, training or  
18 education in the fields of toolmarks analysis, firearm  
19 operability, and serial number restoration, Mr. Best was  
20 permitted to offer opinions in those fields and the reasons for  
21 those opinions. Because of his knowledge, skill, experience,  
22 training or education in the fields of CAD drafting and 3D  
23 modeling, Mr. Johnson was permitted to offer opinions in those  
24 fields and the reasons for those opinions.

25           Ladies and gentlemen, the opinions these witnesses

1 stated should receive whatever weight you think appropriate,  
2 given all the other evidence in the case. In weighing this  
3 opinion testimony, you may consider the witness'  
4 qualifications, the reasons for the witness' opinions, and the  
5 reliability of the information supporting the witness'  
6 opinions, as well as the other factors discussed in these  
7 instructions for weighing the testimony of witnesses. You may  
8 disregard an opinion entirely if you decide that the witness'  
9 opinion is not based on sufficient knowledge, skill,  
10 experience, training or education. You may also disregard an  
11 opinion if you conclude that the reasons given in support of  
12 the opinion are not sound or if you conclude that the opinion  
13 is not supported by the facts shown by the evidence, or if you  
14 think that the opinion is outweighed by other evidence.

15           The parties have agreed what Special Agent Kevin  
16 Kaufman's testimony would be if called as a witness. You  
17 should consider that testimony in the same way as if it had  
18 been given here in court by that witness.

19           One of the issues in this case is whether Mr. Warren  
20 is the same person who committed the offense charged in the  
21 indictment. The government, as I've explained, has the burden  
22 of proving every element, including identity beyond a  
23 reasonable doubt. Although it is not essential that a witness  
24 testifying about the identification be free from doubt as to  
25 the accuracy or correctness of the identification, you must be

1 satisfied beyond a reasonable doubt based upon all of the  
2 evidence in the case that Atiba Warren is the person who  
3 committed the offense charged. If you're not convinced beyond  
4 a reasonable doubt that Atiba Warren is the person who  
5 committed the offense charged in the indictment, then you must  
6 find him not guilty.

7           Identification testimony is the expression of an  
8 opinion or belief by the witness. The value of the  
9 identification depends upon the witness' opportunity to observe  
10 the person who committed the crime at the time of the offense  
11 and the witness' ability to make a reliable identification at a  
12 later time based upon those observations.

13           You must decide whether you believe the witness'  
14 testimony and whether you find beyond a reasonable doubt that  
15 the identification is correct. You should evaluate the  
16 testimony of a witness who makes an identification in the same  
17 manner as you would any other witness. In addition, as you  
18 evaluate a witness' identification testimony, you should  
19 consider the following questions as well as any other questions  
20 you believe are important.

21           First, you should ask whether the witness was able  
22 to observe and had an adequate opportunity to observe the  
23 person who committed the offense charged. Many factors affect  
24 whether a witness had an adequate opportunity to observe the  
25 person who committed the offense charged. Those factors

1 include the length of time during which the witness observed  
2 the person, the distance between the witness and the person,  
3 the lighting conditions, how closely the witness was paying  
4 attention to the person, whether the witness was under stress  
5 while observing the person who committed the offense, whether  
6 the witness knew the person from some prior experience, whether  
7 the witness and person committing the crime were of different  
8 races and whether other factors that you regard -- and any  
9 other factors that you regard as important.

10           Second, you should ask whether the witness is  
11 positive in the identification and whether the witness'  
12 testimony remained positive and unqualified after  
13 cross-examination. If the witness' identification testimony is  
14 positive and unqualified, then you should ask whether the  
15 witness' certainty is well founded.

16           The defendant, Atiba Warren, has pleaded not guilty  
17 to the offense charged. He is presumed to be innocent. As I  
18 previously instructed you, Mr. Warren started the trial with a  
19 clean slate, with no evidence against him. The presumption of  
20 innocence stays with the defendant unless and until the  
21 government has presented evidence that overcomes that  
22 presumption by convincing you beyond a reasonable doubt that  
23 Mr. Warren is guilty of the offense charged. The presumption  
24 of innocence requires that you find the defendant not guilty,  
25 unless you are satisfied that the government has proven his

1 guilt beyond a reasonable doubt.

2           The presumption of innocence means that Mr. Warren  
3 has no burden or obligation to present any evidence at all or  
4 to prove that he is not guilty. The burden or obligation of  
5 proof is on the government at all times to prove that  
6 Mr. Warren is guilty and this burden stays with the government  
7 throughout the trial.

8           Atiba Warren did not testify in this case. The  
9 defendant has an absolute constitutional right not to testify.  
10 The burden of proof remains with the prosecution throughout the  
11 entire trial and never shifts to the defendant. The defendant  
12 is never required to prove that he is innocent. You must not  
13 attach any significance to the fact that Atiba Warren did not  
14 testify. You must not draw any adverse inference against him  
15 because he did not take the witness stand. Do not consider for  
16 any reason at all the fact that Mr. Warren did not testify. Do  
17 not discuss that fact during your deliberations or let it  
18 influence your decision in any way.

19           In order for you to find that Mr. Warren is guilty  
20 of the offense charged, the government must convince you that  
21 the defendant is guilty beyond a reasonable doubt. That means  
22 that the government must prove each and every element of an  
23 offense charged beyond a reasonable doubt. A defendant may not  
24 be convicted based on suspicion or conjecture, but only on  
25 evidence proving guilt beyond a reasonable doubt.



1           Proof beyond a reasonable doubt does not mean proof  
2 beyond all possible doubt or to mathematical certainty.  
3 Possible doubts or doubts based on conjecture, speculation or  
4 hunch are not reasonable doubts. A reasonable doubt is a fair  
5 doubt based on reason, logic, common sense or experience. It  
6 is a doubt that an ordinary, reasonable person will have after  
7 carefully weighing all of the evidence and it is a doubt of the  
8 sort that would cause a reasonable person to hesitate to act in  
9 matters of importance in his or her own life. It may arise  
10 from the evidence or from the lack of evidence or from the  
11 nature of the evidence.

12           If, having now heard all the evidence, you are  
13 convinced that the government has proven each and every element  
14 of the offense charged beyond a reasonable doubt, you should  
15 return a verdict of guilty. However, if you have a reasonable  
16 doubt as to one or more of the elements of the offense charged,  
17 then you must return a verdict of not guilty.

18           As you know, the defendant, Atiba Warren, is charged  
19 in the indictment with violating federal law, specifically,  
20 with knowingly being in possession of a firearm in or affecting  
21 interstate or foreign commerce on or about October 23, 2012, in  
22 the Western District of Pennsylvania, after having been  
23 convicted of a crime punishable by imprisonment for a term  
24 exceeding one year.

25           As I explained at the beginning of the trial, an

1 indictment is just the formal way of specifying the exact crime  
2 the defendant is accused of committing. An indictment is  
3 simply a description of the charge against the defendant. It  
4 is an accusation only. An indictment is not evidence of  
5 anything and you should not give any weight to the fact that  
6 Mr. Warren has been indicted in making your decision in this  
7 case.

8           Your only concern as I've said is to determine  
9 whether or not the evidence admitted in this trial proves the  
10 defendant's guilt beyond a reasonable doubt. The government  
11 and the defendant, Atiba Warren, are equal before the law. No  
12 greater or lesser weight should be given to the testimony of a  
13 witness connected with either party.

14           You've also heard the testimony of law enforcement  
15 officers. The fact that a witness is employed as a law  
16 enforcement officer does not mean that his testimony  
17 necessarily deserves more or less consideration or greater or  
18 lesser weight than that of any other witness.

19           At the same time, it is quite legitimate for defense  
20 counsel to try and attack the believability of a law  
21 enforcement witness on the ground that his testimony may be  
22 colored by personal or professional interest in the outcome of  
23 the case.

24           You, as the jury, must decide after reviewing all  
25 the evidence whether you believe the testimony of the law

1 enforcement witness or witnesses and how much weight, if any,  
2 it deserves.

3           The government has introduced evidence that the  
4 defendant, Mr. Warren, made statements to law enforcement. You  
5 must decide whether Mr. Warren did, in fact, make those  
6 statements. If you find that Mr. Warren did make the  
7 statements, then you must decide what weight, if any, you feel  
8 the statements deserve. In making this decision, you should  
9 consider all matters in evidence having to do with the  
10 statements, including those concerning Mr. Warren himself and  
11 the circumstances under which the statements were made.

12           If after considering the evidence you determine that  
13 a statement was made voluntarily, you may give it such weight  
14 as you feel it deserves under the circumstances. On the other  
15 hand, if you determine that the statement was not made  
16 voluntarily, you must disregard it. In determining whether any  
17 alleged statement was made voluntarily, you should consider  
18 Mr. Warren's age, training, education, occupation and physical  
19 and mental condition and his treatment while in custody or  
20 under interrogation as shown by the evidence in the case.  
21 Also, consider all other circumstances in evidence surrounding  
22 the making of the alleged statement.

23           Mr. Warren is not on trial for committing any act  
24 not charged in the indictment. You may not consider any  
25 evidence of another act as a substitute for proof that he

1 committed the crime charged. You may not use such evidence to  
2 conclude that because Mr. Warren may have committed some other  
3 act, he must also have committed any act charged in the  
4 indictment.

5 Do not return a guilty verdict as to the offense  
6 charged against Mr. Warren unless the government has proven  
7 such crime as charged in the indictment beyond a reasonable  
8 doubt.

9 I will now tell you the essential elements of the  
10 crime charged against the defendant in the indictment.

11 The indictment charges the defendant, Atiba Warren,  
12 with being a felon in possession of a firearm on or about  
13 October 23, 2012, 2012, which is a violation of federal law.

14 In order to find the defendant guilty of this  
15 offense, you must find that the government proved each of the  
16 following three elements beyond a reasonable doubt.

17 First, that Mr. Warren has been convicted of a  
18 felony, that is, a crime punishable by imprisonment for a term  
19 exceeding one year.

20 Second, that after this conviction, Mr. Warren  
21 knowingly possessed the firearm described in the indictment on  
22 or about October 23, 2012.

23 And, third, that Mr. Warren's possession was in or  
24 affecting interstate or foreign commerce.

25 In order to find the defendant, Atiba Warren, guilty

1 of this offense, you must find that the government proved that  
2 before on or about October 23, 2012, Mr. Warren had been  
3 convicted of a crime punishable by imprisonment for a term  
4 exceeding one year.

5           The parties have stipulated that Atiba Warren was  
6 convicted of a crime in state court, that that crime is  
7 punishable by imprisonment for a term exceeding one year, and  
8 that this prior conviction occurred before October 23, 2012.  
9 The parties have also stipulated that this conviction occurred  
10 prior to the time that Atiba Warren is alleged to have  
11 possessed the firearm charged in this indictment.

12           You may treat that stipulation as a proven fact, but  
13 you are not required to do so because you are the sole judge of  
14 the facts.

15           The stipulation that the defendant was convicted  
16 before this incident of a crime punishable by imprisonment for  
17 a term exceeding one year was brought to your attention only in  
18 conjunction with one of the elements of a crime of possession  
19 of a firearm by a convicted felon, as set forth in the  
20 indictment. You are not to speculate as to the nature of the  
21 conviction. You may not consider the prior conviction in  
22 deciding whether Atiba Warren was in knowing possession of the  
23 firearm that he is charged with possessing in this case.  
24 Whether he was in knowing possession of a firearm on or about  
25 October 23, 2012 is a disputed issue in this case.

1           The fact that the defendant was found guilty of  
2 another crime on another occasion does not mean that he  
3 committed this crime on or about October 23, 2012. You must  
4 not use that conviction as proof of the crime charged in this  
5 case, except for the one element of this crime which I've  
6 mentioned. You may find the defendant guilty of the crime  
7 charged in this case only if the government has proved beyond a  
8 reasonable doubt all of the elements of the crime charged in  
9 this case.

10           To establish the second element of the offense, the  
11 government must prove beyond a reasonable doubt that  
12 Atiba Warren possessed the firearm in question.

13           The term "firearm" means any weapon which will expel  
14 or is designed to or may readily be converted to expel a  
15 projectile by the action of an explosive. The term includes  
16 the frame or receiver of any such weapon.

17           To "possess" means to have something within a  
18 person's control. The government does not have to prove that  
19 Mr. Warren physically held the firearm, that is, had actual  
20 possession of it, as long as the firearm was within  
21 Mr. Warren's control, he possessed it. If you find that  
22 Mr. Warren either had actual possession of the firearm or had  
23 the power and intention to exercise control of it, even though  
24 it was not in Mr. Warren's physical possession, that is, that  
25 Mr. Warren had the ability to take actual possession of the

1 object when Mr. Warren wanted to do so, you may find that the  
2 government has proven possession. Possession may be momentary  
3 or fleeting.

4           Mere proximity to the firearm or mere presence on  
5 the property where it is located or mere association with the  
6 person who does control the firearm or the property is not  
7 sufficient to support a finding of possession.

8           Proof of ownership of the firearm is not required.

9           The government must prove that Mr. Warren knowingly  
10 possessed the firearm described in the indictment. This means  
11 that Atiba Warren possessed the firearm purposefully and  
12 voluntarily and not by accident or mistake. It also means that  
13 Atiba Warren knew the object was a firearm.

14           The third element that the government must prove  
15 beyond a reasonable doubt is that the firearm specified in the  
16 indictment was in or affecting interstate or foreign commerce.  
17 This means that the government must prove that at some time  
18 before the defendant's possession, the firearm had traveled in  
19 foreign or interstate commerce.

20           It is sufficient for the government to satisfy this  
21 element by proving that any time prior to the date charged in  
22 the indictment the firearm crossed the state line or the United  
23 States border. The government does not need to prove that the  
24 defendant himself carried it across the state line or the  
25 border or to prove who carried it across or how it was

1 transported. It is also not necessary for the government to  
2 prove that Atiba Warren knew that the firearm had traveled in  
3 foreign or interstate commerce.

4           The parties have stipulated that the firearm in  
5 question was manufactured in a different country than the state  
6 where Atiba Warren is charged with possessing it. You are  
7 permitted to infer from this fact that the firearm traveled in  
8 foreign or interstate commerce. However, you are not required  
9 to do so.

10           Ladies and gentlemen, that concludes my instructions  
11 explaining the law regarding the testimony and other evidence  
12 and the offense charged. Now, let me explain some things about  
13 your deliberations in the jury room and your possible verdicts.

14           The first thing you should do in the jury room is  
15 choose someone to be your foreperson. This person will speak  
16 for the jury here in court. He or she will also preside over  
17 your discussions. However, the views and vote of the  
18 foreperson are entitled to no greater weight than those of any  
19 other juror.

20           Second, I want to remind you that your verdict,  
21 whether it is guilty or not guilty, must be unanimous. To find  
22 Atiba Warren guilty of the offense, every one of you must agree  
23 that the government has overcome the presumption of innocence  
24 with evidence that proves each element of that offense beyond a  
25 reasonable doubt. To find Atiba Warren not guilty, every one



1 of you must agree that the government has failed to convince  
2 you beyond a reasonable doubt.

3 To assist you, a verdict form has been prepared for  
4 you to record your verdict.

5 Mr. Babik, if you would pass a copy out for the  
6 jury.

7 We'll show you a copy of the form now so you can see  
8 what it looks like and I'll explain it to you.

9 Our alternates at the end can look over the form of  
10 your neighbor.

11 As I've said, ladies and gentlemen, to assist you in  
12 that process, a verdict form has been prepared for you to  
13 record your verdict. We have given you a copy to look at as I  
14 explain this.

15 If you find unanimously that the government has  
16 proved beyond a reasonable doubt each of the elements of the  
17 offense as charged in the indictment, then you should find  
18 Mr. Warren guilty and your foreperson should note "guilty" in  
19 the space provided on the verdict form for the offense.  
20 However, if you find unanimously that the government has not  
21 proved beyond a reasonable doubt each element of the offense  
22 charged in the indictment, then you must find Mr. Warren not  
23 guilty of that offense and your foreperson should note "not  
24 guilty" in the space provided on the verdict form. You should  
25 remember that the burden is always on the government to prove

1 beyond a reasonable doubt each and every element of an offense  
2 charged in an indictment. Once you have reached your unanimous  
3 verdict, your consideration of the charge in this case is then  
4 concluded and you should sign and date the verdict form as  
5 noted and activate the signal that you've reached a verdict.

6           If you could pass those verdict forms back down for  
7 Mr. Babik to retrieve.

8           Thank you, Mr. Babik.

9           Ladies and gentlemen, remember, Mr. Warren is not on  
10 trial for any act or conduct not specifically charged in the  
11 indictment. Your job is limited to deciding whether the  
12 government has proved beyond a reasonable doubt the crime  
13 charged in the indictment.

14           If Mr. Warren is found guilty, it will be my duty to  
15 decide what the punishment will be. You should not be  
16 concerned with punishment of Mr. Warren. It should not enter  
17 into your consideration or discussions in any way.

18           In conducting your deliberations and returning your  
19 verdict, there are certain rules you must follow.

20           When you retire, I suggest that you conduct your  
21 deliberations in a business-like manner in order to determine  
22 the issues of fact in this case using these instructions as  
23 your guide. You should engage in a rational discussion of the  
24 evidence which you've heard and seen for the purpose of  
25 reaching a unanimous verdict.

1           Your verdict must represent the considered judgment  
2 of each juror. In order to return a verdict, it is necessary  
3 that each juror agree to it, in other words, your verdict must  
4 be unanimous.

5           If during your deliberations you determine that you  
6 have the need to communicate with me, please reduce your  
7 message or question to writing signed by the foreperson and  
8 flip the signaling button in the jury room and give that note  
9 to Mr. Babik, my courtroom deputy, who will bring it to my  
10 attention.

11           I will then confer as necessary with the attorneys  
12 regarding your inquiry and then we'll respond to you as  
13 reasonably soon as possible either in writing or by having you  
14 return to the courtroom so that I can speak to you personally.

15           Mr. Babik will provide supplies in that regard,  
16 should you need to communicate with the Court.

17           I caution you, however, with regard to any message  
18 or question you might send that you should never state, specify  
19 or even hint at any numerical vote division which may exist  
20 among you at any time.

21           It is your duty as jurors to consult with one  
22 another and to deliberate in an effort to reach agreement, if  
23 you can do so without violence to individual judgment. Each of  
24 you must decide the case for yourself but only after an  
25 impartial consideration of the evidence in the case with your

1 fellow jurors.

2           Talk with each other, listen carefully and  
3 respectfully to each other's views and keep an open mind as you  
4 listen to what your fellow jurors have to say. In the course  
5 of your deliberations, do not hesitate to re-examine your own  
6 views and change your opinion if you become convinced that it  
7 is erroneous. But do not surrender your honest conviction has  
8 to the weight or effect of the evidence solely because of the  
9 opinion of your fellow jurors or for the mere purpose of  
10 returning a verdict.

11           No one will be allowed to hear your discussions in  
12 the jury room and no record will be made of what you say. You  
13 should all feel free to speak your minds.

14           If you elected to take notes during the trial, your  
15 notes should be used only as a memory aid. You should not give  
16 your notes greater weight than your independent recollection of  
17 the evidence. You should rely upon your own independent  
18 recollection of the evidence or lack of evidence, and you  
19 should not be unduly influenced by the notes of other jurors.  
20 Notes are not entitled to any more weight than the memory or  
21 impression of each juror.

22           Remember at all times you are not partisans, you are  
23 judge, judges of the facts. Your sole interest is to seek the  
24 truth from the evidence presented in the case.

25           Your verdict must be based solely on the evidence

1 and on the law which I have given you in my instructions. I  
2 repeat, you cannot return a verdict as to the one charge in  
3 this case, whether guilty or not guilty, unless it is agreed to  
4 by all of you unanimously.

5           Finally, the verdict slip form we have prepared is  
6 simply the written notice of the decision that you reach in  
7 this case. There is space for twelve signatures on the verdict  
8 slip and all of you must sign it. I have reviewed that form  
9 with you.

10           It is proper to add the caution that nothing said in  
11 these instructions and nothing in your verdict slip prepared  
12 for your convenience is meant to suggest or convey in any way  
13 or manner any intimation as to what verdict I think you should  
14 find. What the verdict shall be is your sole and exclusive  
15 duty and responsibility.

16           If you have not reached a verdict by 4:30 p.m.  
17 today, you may continue to deliberate later, but only if all of  
18 you unanimously agree and your foreperson so advises me by  
19 sending a signal and note to Mr. Babik in writing. If you do  
20 not unanimously agree to continue deliberations, you may leave  
21 at 4:30 p.m. after notifying Mr. Babik that is your intention,  
22 then report to the jury room tomorrow morning at 9:00 a.m. to  
23 continue with your deliberations. You are instructed that  
24 during deliberations, you're not permitted to engage in any  
25 research on your own. You should not seek information

1 regarding any aspect of this trial from any source outside of  
2 the courtroom. It would be improper for you to discuss any of  
3 the issues in this case with any person, including members of  
4 your family, until your deliberations have been concluded.

5 Please, remember my instruction to not read about  
6 the case should there be any articles in the newspaper and not  
7 listen to any radio broadcasts or television broadcasts should  
8 there be any concerning this case.

9 You will note from the oath that had been taken by  
10 my deputy, Mr. Babik, and the other members of the Court staff  
11 that they, too, as well as all others are forbidden to  
12 communicate in any way or manner with any member of the jury on  
13 any subject touching the merits of this case. During your  
14 deliberations, you must continue to observe all of the  
15 restrictions I've instructed you on throughout the trial. Do  
16 not speak at all with any of the parties, the witnesses or the  
17 attorneys, do not permit anyone to discuss the case with you,  
18 do not even remain in the presence of anyone that might be  
19 discussing the case. If anyone approaches you and tries to  
20 talk with you about the case, please report that to me through  
21 Mr. Babik immediately.

22 While I do not know whether there is any news  
23 coverage of this case, do not watch or listen to any news  
24 reports concerning this trial on television or radio and do not  
25 read any news accounts of this trial in a newspaper or on the

1 Internet or anywhere else. Do not use the Internet to search  
2 for information about the parties, witnesses, lawyers or  
3 anything else associated with the trial. Do not visit the  
4 scene of the alleged offense or conduct any kind of  
5 investigation of your own. The only information you're allowed  
6 to consider in deciding this case is what you learned in this  
7 courtroom during the trial.

8           In a moment I'll ask Mr. Babik to assist the twelve  
9 seated members of our jury up to the jury room so that you may  
10 begin the work that I've described.

11           Shortly thereafter, Mr. Babik and other members of  
12 my staff will deliver to the jury room copies of the  
13 instructions as I promised they would be provided to you, the  
14 exhibits that had been entered into trial.

15           As you saw, some of the materials presented by  
16 counsel were through the use of the visual screens in the  
17 courtroom. We have made arrangements that we will have  
18 available to you in the courtroom a laptop computer. It's  
19 capable of doing one thing and one thing only and that's  
20 showing the content of a thumb drive that is marked as  
21 containing some of the exhibits in this case. Another member  
22 of the Court's staff skilled in computer matters will bring  
23 that computer up to the jury room. He, too, will have been  
24 sworn, just as Mr. Babik and my staff was, and will show how  
25 the computer is to be activated.

1           It is your choice and your choice alone how and  
2 whether you consider any of those materials, including the use  
3 of the computer. It's being provided for your convenience if  
4 you find that is something you want to do. You're not required  
5 to use it or to not use it.

6           I will ask Alternate No. 1 and Alternate No. 2 to  
7 remain in the courtroom after Mr. Babik has assisted the other  
8 twelve seated members of the jury to the jury room to begin  
9 their deliberations.

10           Ms. King and Mr. Ortiz, are there any other matters  
11 that you believe the Court should address with the jury at this  
12 time?

13           MS. KING: No, Your Honor. Thank you.

14           THE COURT: Mr. Sindler, any matters you believe the  
15 Court should address with the jury at this time?

16           MR. SINDLER: No.

17           THE COURT: I see in the back of the courtroom  
18 Mr. Shawn Fox of the Court's technology staff.

19           If you could please come forward to be sworn as jury  
20 bailiff.

21           (Administration of the oath.)

22           THE COURT: Mr. Fox, you've now been duly sworn as a  
23 jury bailiff. At the appropriate time as designated by  
24 Mr. Babik, deliver the computer we've identified earlier up to  
25 the jury room.



1           Mr. Babik, would you please assist the jury as they  
2 retire to the jury room to commence their deliberations.

3           (Jury is dismissed from the courtroom.)

4           THE COURT: The Court will now address Alternate  
5 Juror No. 1 and Alternate Juror No. 2.

6           I'm reminded of a piece of wisdom I wish I could say  
7 who it's attributed to, but I believe it says, those who wait  
8 also serve. I think it probably should have been written for  
9 folks that are called to serve as alternate jurors.

10           You are not yet discharged from jury duty because  
11 those who wait also serve.

12           We will place you in the hands of Mr. Greer of my  
13 staff who you met earlier. He will escort you down to the jury  
14 room on the third floor where you can be comfortable. There is  
15 a staff member from the Court down there.

16           Later this afternoon, Mr. Greer will check in with  
17 you and he'll advise you either to come back up here because I  
18 have some activity that I'm required to take regarding your  
19 service, or he may advise you that you're to report to the jury  
20 room on the third floor at or about nine o'clock tomorrow  
21 morning. We'll know the answer to that a little later.

22           All of the admonitions and directions and cautions  
23 that I have been giving throughout the trial and that I gave to  
24 the twelve seated members of the jury moments ago apply 100  
25 percent full force and effect for you. For purposes of our

1 trial because you're serving while waiting and might, if there  
2 was a need, be called upon to begin participating as a  
3 deliberating juror, you may not and should not seek out or  
4 receive any information regarding this case, its participants  
5 or its issues from any source, human, technological, printed,  
6 broadcast or otherwise. You may not discuss the issues and  
7 matters involved in this case even with one another or any  
8 member of the Court staff, family, friends, or otherwise until  
9 I advise you otherwise. And should anyone attempt to do any of  
10 those things with you, please notify a member of the Court  
11 staff immediately and we would act in an appropriate fashion.

12 Ms. King and Mr. Ortiz, do you believe there's  
13 anything else we should advise the alternate jurors of?

14 MS. KING: No, Your Honor.

15 THE COURT: Anything else we should advise the  
16 alternate jurors of?

17 MR. SINDLER: No.

18 THE COURT: Mr. Greer, please assist our alternate  
19 jurors and their belongings to the jury assembly room on the  
20 third floor. I believe we have previously alerted a member of  
21 the Court staff that they will be coming down.

22 Please rise for the alternate jurors.

23 (Alternate jurors are dismissed from the courtroom.)

24 THE COURT: Mr. Fox, could you please step forward,  
25 sir.

1           Mr. Fox, you're a member of not only now a jury  
2 bailiff in this case but you're a member of the Court's IT  
3 staff. Mr. Fox, it's the Court's understanding that the Court  
4 has a laptop computer, that it is maintained for purposes such  
5 as these and that it does not have the ability to access the  
6 Internet or any other external source and otherwise, has a  
7 clean drive. There is nothing else on it and that you have  
8 personally confirmed that.

9           Is all of that true?

10          MR. FOX: That is correct.

11          THE COURT: Ms. King and Mr. Ortiz, do you have any  
12 voir dire of Mr. Fox in those regards, or do you want to  
13 personally examine the laptop?

14          MS. KING: No. Thank you.

15          THE COURT: Mr. Sindler?

16          MR. SINDLER: Same answer.

17          THE COURT: Mr. Fox, I authorize and direct you to  
18 accompany Mr. Babik at the time designated by Mr. Babik when he  
19 delivers the exhibits to the jury room with the laptop computer  
20 to display to the jury how to activate and use the computer if  
21 in their election they decide to do so.

22          Mr. Fox, anything that you'd like to bring to the  
23 Court's attention or any questions you think you need my  
24 answers to?

25          MR. FOX: No.

1 THE COURT: At this point, we'll recess the Court.

2 Mr. Babik will review the materials that will be  
3 delivered up to the jury room.

4 Ms. King and Mr. Ortiz, do you have any objections  
5 to the Court's instructions to the jury as delivered in open  
6 court.

7 MS. KING: Actually one.

8 THE COURT: Please bring it to the Court's  
9 attention. If you could reference the paragraph.

10 MS. KING: Paragraph 60.

11 THE COURT: I'm there.

12 MS. KING: The Court said: Do not return a verdict  
13 of guilty as to the offense, and my written copy says any  
14 offense.

15 THE COURT: It did. I modified that as I was  
16 speaking since there was one count in the indictment that was  
17 otherwise consistent.

18 MS. KING: I agree with the modification, if it  
19 could just be changed.

20 THE COURT: Mr. Sindler, do you think "any" should  
21 be changed?

22 MR. SINDLER: I have already done it.

23 THE COURT: I take that as you agree it should?

24 MR. SINDLER: Yes.

25 THE COURT: That change will be made.

1 Ms. King and Mr. Ortiz, otherwise, any objections or  
2 corrections to the charge as delivered to the jury?

3 MS. KING: No.

4 THE COURT: Mr. Sindler, same question of you?

5 MR. SINDLER: No.

6 THE COURT: Mr. Babik, I'll arrange for that change  
7 to be made by Mrs. Dressler and she will deliver twelve copies  
8 to you for delivery to the jury room.

9 Ms. King and Mr. Ortiz, any other matters that we  
10 should take care of --

11 I will say that once we know at or about 4:30 as to  
12 whether the jury is continuing today or electing to conclude  
13 for the day and come back tomorrow, Mr. Babik will notify  
14 counsel. I do not require counsel to remain within the  
15 environs of the courtroom. You're welcome to. We'll make  
16 those arrangements, but we simply need to make sure Mr. Babik  
17 knows how to get ahold of you. Once we know what the jury's  
18 intentions are, we'll make sure counsel is brought aware of  
19 that.

20 With that, Ms. King, anything else we should take up  
21 here?

22 MS. KING: No.

23 THE COURT: Mr. Sindler, same question?

24 MR. SINDLER: No.

25 THE COURT: Mr. Babik, you can recess the Court.

1 (Court adjourned.)

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I-N-D-E-X

4 WITNESS

Direct

Cross

Redirect

Recross

5 Travis Johnson

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CERTIFICATE

8 I, Juliann A. Kienzle, certify that the foregoing is a  
9 correct transcript from the record of proceedings in the  
above-titled matter.

10

s/Juliann A. Kienzle, RMR, CRR

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Juliann A. Kienzle, RMR, CRR

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